Central Law Journal.

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Unfortunately, the recent conspicuous lack of harmony among the members of the Supreme Court of the United States shows no apparent sign of abatement. In a decision handed down on January 6, 1902 (Tucker v. Alexandroff, 22 Sup. Ct. Rep. 196), the court divides five to four on a very interesting and important question of international law. In this case a member of the Russian naval service, sent to the United States as one of a force ordered to take possession and serve as the crew of a protected cruiser built in this country for the Russian government, deserted before the crew was organized as such and without ever setting foot upon the vessel. The court, speaking through Justice Brown, held that he was a deserter from a Russian ship of war, within the meaning of the treaty of 1832 with Russia, authorizing the arrest and surrender of deserters from ships of war of that country, although such cruiser had not yet been commissioned as a member of the Russian navy. The question involved in this decision becomes important at this time because of the fact that foreign nations are coming to the sound conclusion that America is the proper place to build ships of war. No doubt our war with Spain was a striking advertisement of our ability in this direction. However, that may be, the fact is that ships of war of many and various nations are being constructed in American ship yards. On the completion of a vessel it becomes incumbent upon the foreign government for whom the ship is being built, to send over a crew to take her away. Under such circumstances no true American, even with all the modesty that is characteristic of our race, can deny that quite often it may happen that members of such crews, as they touch our shores, becoming enamored of our country, will be constrained to throw off the shackles of old world militarism and cast in their lot with us. This was the identical experience of Alexandroff, the petitioner in this case.

It appears that Alexandroff entered the Russian naval service as a conscript, in 1896, at the age of seventeen, and was assigned to the duties of an assistant physician. Some time in October, 1899, an officer and a detail of fifty-three men, among whom was Alexandroff, were sent from Russia to Philadelphia to take possession of and man The Variag, then under construction by the firm of Cramp & Sons, in that city. The Variag was still upon the stocks when the men arrived in Philadelphia. She was, however, launched in October or November, 1899, and at the time Alexandroff deserted was laying in the stream still under construction, not yet having been accepted by the Russian government. Alexandroff left Philadelphia without leave April 20, 1899, went to New York, and there renounced his allegiance to the Emperor of Russia, declaring his intention of becoming a citizen of the United States. He was subsequently arrested upon the written request of the Russian vice-consul, and on June 1, 1900, was committed upon a *mittimus* stating that he had been charged with desertion from the imperial Russian cruiser Variag, upon the complaint of the captain, in accordance with the terms of the treaty between the United States and Russia.

It is perfectly clear that in the absence of a treaty our courts cannot be called upon to reclaim deserters from either the army or the navy of a foreign prince. In The Exchange, 7 Cranch, 116, decided by Chief Justice Marshall and recognized as authority not only in this country but also all over the civilized world, it was held that The Exchange being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory under an implied promise that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

In his argument on this question Justice Marshall laid down three exceptions to the exclusive sovereignty of a state within its own territory: 1st. The exemption from arrest or detention of a foreign sovereign entering the territory of a nation with the license of its sovereign. 2d. The immunity which all civilized nations allow to foreign ministers. 3d. The cession

of a portion of the territorial jurisdiction by allowing the troops of a foreign prince to pass through the territory.

The question in this case was therefore whether The Variag came within the purview of this decision or within the provisions of the treaty of 1832 with Russia authorizing the arrest and surrender of deserters from *ships of war*, although the vessel had not yet been fully completed nor commissioned as a member of the Russian navy. The minority, speaking through Justice Gray, say that they find no precedent, either in our own decisions or in the books of international law, for extending the exemption to an uncompleted ship, or to sailors who have never been on board of her, although intended to become part of her crew when she shall have been completed.

The majority of the court recognized this principle but affirmed that our treaty with Russia for the return of deserters from ships of war being operative upon both of the signatory powers, and intended for their mutual protection, should be interpreted, in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. They hold that The Variag, though not completed or commissioned, was a Russian ship of war and therefore clearly within the provisions of the treaty. In reply to this contention Justice Gray makes this strong argument: "The Variag in her existing condition was not a Russian ship of war exempt from the jurisdiction of the United States and subject to the exclusive jurisdiction of her own country. The Russian government had never accepted or taken possession of the ship, and, by the terms of the contract under which she was building, still had the right to reject her. So long as they had that right no body of men could be considered as actually part of her crew, whatever they might have been after her acceptance. The evident intent of the treaty is to afford a remedy for the common case of sailors deserting their ship, on her coming into port, at the risk of leaving her with no sufficient crew to continue her voyage; and not to the case of a ship which has never been completed, or equipped for sea, or to persons collected together on shore for an indefinite period, doing no naval duty, though intended ultimately to become part of her crew."

NOTES OF IMPORTANT DECISIONS.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF CONTRACTOR IN EXCAVATING OR REPAIRING STREETS AND SIDEWALKS.—Much unnecessary litigation is indulged in by many citizens in attempting to hold a municipality liable for injuries received upon the highway. The city is not an insurer of the lives and safety of the public against all defects in the highway. The law imposes upon the city the duty of keeping its ways in a condition reasonably safe for public travel. Necessarily there must be times when they cannot be in good condition,—as, for instance, while repairs are being made,—and at such times travelers are put upon their guard as to obvious dangers. Outside of these limitations, however, the city's liability is clear. Thus, in the recent case of Beattie v. City of Detroit, 88 N. W. Rep. 71, the Supreme Court of Michigan held that where a paving contract provided that the work should be done so as to interrupt as little as practicable the free use of the street by the public, and that no portion of the street should be wholly obstructed without permission of the board of public works, under whose direct supervision the work was done, and temporary plank bridges were made by the contractor over excavations at various street crossings, the city was liable for injuries resulting from the negligent construction of one of such bridges. In this case the interesting question is presented,—whether a city can absolve itself from negligence by turning the highway over to a contractor. On this point the court says:

"A city cannot, by merely contracting with somebody that he will keep the street in a condition reasonably safe (whether the contract specifies the method or not), relieve itself from the statutory liability, and impose it upon another. Thus a contractor may promise to keep a trench fenced, or signal lamps in it at night, and do neither. One injured in consequence is not without remedy against the city, for the statutory responsibility rests there. Monje v. City of Grand Rapids, 122 Mich. 645, 81 N. W. Rep. 574; Baker v. Same, 111 Mich. 447, 69 N. W. Rep. 740; Dill. Mun. Corp. § 1027, and note."

The following are the latest authorities: Where a city had permitted plumbers to dig ditches in its streets, it was not error, in an action for an injury resulting to plaintiff from his falling into such ditch, to refuse to instruct that recovery against the city could not be had because it had not constructed the ditch. Foy v. City of Winston, 126 N. Car. 381, 35 S. E. Rep. 609. Where a city, under its charter, is responsible for constructing sewers and their connections, it is liable for injury to one falling into a trench for a sewer connection negligently left uncovered, though the work was done by a licensed plumber. Monje v. City of Grand Rapids, 122 Mich. 645, 81 N. W. Rep. 574. Were, however, a town authorized a telephone company to erect poles in the streets,

no liability attaches for injuries to a pedestrian caused by falling into a hole which the company had dug inside the curbing of the pavement of a sidewalk, and had negligently left uncovered an hour and a half before the accident, where the town had no actual notice of the company's negligence. Town of Franklin v. Houser, 104 Tenn. 1. It is necessary, it will be observed, that the city have actual or constructive notice of defect. But if it have such notice, the liability of the city is fixed, even if the excavation or obstruction was unauthorized. Thus, although a city is under no obligations to construct a crossing over an alley connecting the walks of the streets, yet if it allowed persons to place loose boards there, which, by reason of their becoming warped and shifted about, renders it dangerous for persons having occasion to cross such alley, it will be liable to the same extent that it would be, had it undertaken to construct a crossing and allowed it to become out of repair. City of Springfield v. Tomlinson, 79 Ill. App. 399.

SHIPS AND SHIPPING—EFFECT OF STATUTES REQUIRING EMPLOYMENT OF LICENSED PILOTS ON LIABILITY FOR PILOT'S NEGLIGENCE—COMPULSORY PILOTAGE.—It is by no means settled what effect statutes requiring the employment of licensed pilots have upon the liability of the owner for the negligence of such pilots. In a recent case where the defendant's vessel, while under the command of a New York licensed pilot and wholly through his fault, collided with a pier owned by the plaintiff, the court held that the defendant was not liable in an action at common law, upon the ground that he was not personally at fault and that, as the employment of the pilot was compelled by the New York statute, the defendant could not be made responsible as principal. Homer Ramsdell Co. v. La Compagnie Generale Transatlantique, 182 U. S. 406. This result in an action at law seems obviously correct. Yet the injured party may also have alternative remedies in admiralty, and since his rights are then governed by the principles of maritime law, it is by no means necessary that the same result should be reached. A libel *in rem* is based upon the distinct conception that the right to redress it is against the ship itself; in other words, that the ship is the offending person, regardless of the fact under whose control it was at the time of the collision. As culpability may thus be fixed upon the ship it has consequently been held in the United States that a libel *in rem* will be sustained under such circumstances. The China, 7 Wall. 53. In England, after many conflicting decisions, the opposite conclusion has been reached. The Halley, L. R. 2 P. C. 193. Although perhaps a trifle harsh the American rule is a logical outcome of the principles of maritime law; it is furthermore supported by the law of Continental Europe. 5 Lyon-Caen Et Renault, Droit Commercial, §§ 190, 190 *bis*. In the remaining alternative open to one injured under such circumstances—a libel *in personam* against the owner—the peculiar doctrine which allows recovery where the ship is libeled *in rem* can have no application, and the same result should be reached as in an action at law. See Curtis, Merchant Seamen, 196.

As to what constitutes compulsory employment, however, the provisions of the statutes vary so greatly that no uniform rule can be deduced from the cases. Thus a New York statute, providing that any unlicensed person piloting a vessel to or from the port of New York shall be deemed guilty of a misdemeanor punishable by fine or imprisonment, has been held to make the pilotage compulsory. The China, *supra*. The Massachusetts statute, on the other hand, provides for a forfeiture of the whole pilotage fees if a tender of services is refused, and that of Louisiana inflicts a penalty of one-half the fees; both statutes have been regarded in *dicta* as not compulsory. Martin v. Hilton, 9 Met. (Mass.) 371; The Merrimac, 14 Wall. 199. The same result was reached under a Pennsylvania statute by which a master is "required and obliged" to employ a pilot or forfeit one-half the fees to a charitable organization. Flanigen v. Washington Ins. Co., 7 Pa. St. 306. In England the forfeiture of the fees is generally held to make the pilotage compulsory. The Maria, 1 W. Rob. 95. Yet curiously enough a penalty of double the fees has been interpreted in the opposite. Attorney-General v. Case, 3 Price, 302. A vague distinction has been attempted in these cases between the forfeiture of pilotage fees and a "penalty." Story, Agency (2d Ed.), § 456a. It is impossible from such a conflict to determine a satisfactory rule; it seems, however, that American courts do not consider a provision as obligatory unless its breach is punishable as a misdemeanor. Certainly the interpretation of the Pennsylvania statute is an indication of such an intention.—*Harvard Law Review.*

MONOPOLIES — CONTRACTS RESTRAINING TRADE IN AN ENTIRE STATE.—In Union Strawboard Co. v. Bonfield, decided in the Supreme Court of Illinois, in December, 1901, (61 N. E. Rep. 1038), it was held that a covenant by the seller of a manufacturing business not to engage for the period of twenty-five years in the manufacture or sale of the articles manufactured anywhere is void, as against public policy, being in general restraint of trade.

It was further held that the covenant requirement not to engage in the same business in the state is void, as being in general restraint of trade and against the public policy of the state, giving its citizens the privilege of pursuing their lawful occupations at some place within its borders.

As to the correctness of the decision of the Illinois court upon the first point, there probably would be no controversy. The leading case on this subject in New York is Diamond Match Co. v. Roeber, 106 N. Y. 473. In that case the

court went very far in declaring a contract in restraint of trade to be only partial and upholding it on such ground. It appeared that defendant, who was engaged in the manufacture in New York and in the sale throughout the states and territories of friction matches, sold his manufactory, stock, fixtures, trade, trade-mark and good will of the business to a corporation then engaged in the same manufacture in the states of Connecticut, Delaware and Illinois, selling its manufactures throughout the country. The bill of sale contained a covenant, on the part of defendant, with the purchaser "and assigns" that he would not, at 'any time within ninety-nine years engage in such manufacture or sale, except in the service of the purchasing company, within any of the states [or territories, except Nevada and Montana.

There seems to be a conflict between the New York case and the Illinois case upon the point whether an absolute covenant to refrain from trade within the state where the contract is made is necessarily fatal to its validity. On this point the Illinois court said:

"The fact that engaging in business might interfere with the business or injure or lessen the profits of the Union Strawboard Company makes no difference if the contract is against public policy. The restrictions imposed by this contract are probably no greater than necessary to prevent competition with the Union Strawboard Company in its business, but that is not the only test of its validity. If it should be conceded that the contract is divisible, the question then is, under this declaration, whether it can be enforced as to the entire state of Illinois. Counsel contend that it is valid to that extent, at least, and that the rule stated on that subject in the cases above cited should not be adhered to. The reason for the rule is that it is against the policy of the state that the people of the whole state should be deprived of the industry and skill of a party in an employment useful to the public, and he should be compelled either to engage in other business or abandon his citizenship of the state and remove elsewhere in order to support himself and family. The argument is that a contract, to be in general restraint of trade, must extend to the entire realm of the United States, which would not be deprived of the industry of the citizen or of his citizenship unless he must go to a foreign country. Within its own sphere the state has a public policy as a commonwealth, which the courts of the state regard and enforce, distinct from questions of policy affecting the nation at large. The state regulates its internal affairs, supports those who become public charges, and is interested in the industries of its citizens. It is against the policy of the state that its citizens should not have the privilege of pursuing their lawful occupations at some place within its borders, and that a citizen should be compelled to leave the state to engage in his business and to support himself and family. It is true that a contract may be valid which embraces portions of more than one state. Trade and business are not affected by state lines, and a contract might be good in restraint of trade which embraced, within reasonable limits, parts of different states, but an agreement which applies to the whole state is void, and cannot be enforced."

On the other hand, the New York court in Diamond Match Co. v. Roeber, *supra*, held that the question what is a general restraint of trade does not depend upon state lines; that they are not the boundaries of trade and commerce and that a restraint is not necessarily general which embraces an entire state. In making this decision the New York Court of Appeals cites the case of Chappel v. Brockway, 21 Wend. 157, and says that a remark in the opinion in that case which is in accord with the doctrine of Union Strawboard Co. v. Bonfield is not controlling. "The attention of the court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the state of New York, but excepted other states from its operation. The remark relied upon was *obiter*, and in reason cannot be considered a decision upon the point suggested. We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the states are not those of trade and commerce, and business is restrained within no such limit. The country, as a whole, is that of which we are citizens, and our duty and allegiance are due both to the state and nation. Nor is it true, as a general rule, that a business established here cannot extend beyond the state, or that it may not be successfully established outside of the state. There are trades and employments which, from their nature, are localized; but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon state lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial."

In our judgment the position taken by the New York Court of Appeals is sounder in principle and more agreeable to common sense than that assumed by the Supreme Court of Illinois.—*New York Law Journal.*

INJURIES IN THE FAMILY RELATIONS—ACTIONS BY HUSBAND AND WIFE.

In a former state of society the family was the unit. The husband was the head and representative of the family. The various

members of the family were his dependents, and his power over them was virtually absolute, being restricted, to some extent, by consideration for the state more than by reason of any idea of duty towards the individual. Our theory of the formation of society has changed vastly, the individual being with us the unit. When the father was the arbiter of the fate of his wife and children, it is clear that the individual members of the family had but slight means of redress for wrongs. The law relating to family rights has not kept pace with the changed conditions of society. Speaking of the position of married women in England, Sir Frederick Pollock says: "As a matter of history—and pretty modern history—the development of the law has been strangely halting and one-sided." Notwithstanding, the last few years have witnessed, in this country, an advance in the law as salutary as it has been radical. But although the force of enlightened sentiment has compelled the remedying of very grave defects, it cannot be expected that the improvement of the law will keep pace with the progress of the most enlightened thought, and however we may feel with regard to certain individual cases "it is probably true," as was remarked by Judge Cooley, "that in the vast majority of cases the natural impulses and affections have more influence in securing the observance of moral obligations in the family relations than the law could exercise or possess."[1]

Actions by the Husband.—At the common law the husband might recover for injury to the property which he obtained through his wife. With regard to the husband's right of action for injury to the wife's person, Sir Frederick Pollock[2] points out that the common law gave three different writs arising out of three different classes of circumstances. One is that *per quod consortium amisit* arising out of a physical injury to the wife by trespass. The development of the law led to including in this class cases of injury to the wife's person arising from mere negligence. The next class of cases consists of those commonly known as actions of criminal conversation. The basis of this is trespass *vi et armis*, on the theory that the wife is not a free agent or separate person, and that, therefore, her consent is immaterial. The adulterer, then, is pursued as a mere trespasser. The third class embraces, theoretically, actions for enticing away servants, and originated either at common law or under the statute of laborers. This was the basis of the action for merely persuading or enticing the wife to live separately from her husband without sufficient cause.[3]

For an injury to the wife's person resulting in her inability to perform services, or in a lessening of her ability, the husband might maintain an action. In such action damages might be awarded for the loss of services and of the wife's society, and for amounts expended for medical attendance, nursing and the like.[4] If the husband and wife are injured by the same act, recovery by the husband for the injury to himself does not deprive him of the right to recover for the injury to the wife.[5] But the wife's contributory negligence is a defense to an action by the husband for personal injuries to her.[6]

The bearing on this question of th statutes, emancipating women from the common-law disabilities, was considered by the court in the case of C., B. & Q. R. Co. v. Hovey, cited in the last note, where Thayer, Dist. J., said: "We think it is a mistake to suppose that these statutes were intended to, or that they have, in fact, utterly extinguished the reciprocal obligations and rights of husband and wife which were formerly incidental to the marriage relation. It certainly cannot be maintained that the husband is entitled to sue for damages consequent upon the loss of his wife's services and society, unless she is still under an obligation to the husband as, at common law, to care for his home, attend to the wants of his family, and do whatever else is within her power which is conducive to his comfort, happiness and prosperity." Notwithstanding these statutes the common-law presumption of compulsion by the husband, if the wife does an unlawful act in his

[1] Cooley's Elements of Torts, 14.
[2] Pollock on Torts, 208 *et seq.*
[3] See Crocker v. Crocker, 98 Fed. Rep. 702.
[4] Wash. & G. R. Co. v. Hickey, 12 App. D C. 269.
[5] Skoglund v. Minneapolis St. R. Co., 45 Minn. 330, 11 L. R. A. 222.
C., B. & Q. R. Co. v. Honey, 63 Fed. Rep. 39, 26 L. R. A. 42; Winner v. Oakland Tp., 158 Pa. St. 405.

presence, still continues.[7] By them the wife is not put on the same plane as a concubine, and is not relieved "from those marital duties and obligations she takes upon herself at the marriage altar, and which are inherent in the relation of husband and wife among all christian people. The statute does not purport to relieve a wife, and was not intended to relieve her from the legal duty of performing those services, which it is the pleasure of every good housewife to render her husband in sickness and health, independently of any merely technical legal obligation, and which she would render despite any statute that could be enacted to the contrary. These rights and duties are imposed by a law having a much higher and better source than the common law, which simply imparts to them that legal sanction essential to their maintenance and protection in a court of law against invasion from any quarter."[8] In Iowa the husband cannot recover if the wife has followed an independent employment.[9]

The word "service," as indicating the ground of action, implies whatever of aid, assistance, comfort, and society the wife would be expected to render to, or bestow upon, her husband, under the circumstances, and in the condition in which they may be placed.[10] It is immaterial that she renders no service at all in the sense of work done by a servant. If, however, she is in the habit of assisting him in the conduct of his business, he may recover for a loss which injury to her entails upon him in that respect.[11] At the common law, if the injury resulted in her death, the recovery was limited to the loss suffered between the time of the injury and the time of death. The death could not be shown even as an aggravation of the damages.[12] This has been, however, very generally changed by statute.

Against one who entices his wife away, the husband may have an action on the case for damages. The basis of this action is the loss of the *consortium*, by which is meant the society, companionship, affection, assistance and fidelity of the spouse.[13] This action is not now confined to cases of elopement or adultery, but may be brought in any case where the happiness of domestic life is interfered with, or where a wife is induced to leave her husband's home.[14] In the action of criminal conversation the invasion of the husband's rights is the defilement, and it is immaterial whether the defilement is accomplished by force, or with the consent of the wife. The action will lie in either case.[15] The wife's consent, however, may be considered to reduce damages,[16] but the consent of the husband is a complete bar to the action.[17] And the question of the force employed in such a case is always for the consideration of the jury.[18] On the question of damages in such a case the jury may consider: 1, the dishonor of the marriage bed; 2, the loss of the wife's affections; 3, the loss of the wife's society; 4, the loss of the wife's services, which will be *a*, total, if she leaves the husband's home, *b*, probably diminished in value if she does not; and 5, the husband's mortification and sense of shame.[19]

No pecuniary loss is a prerequisite to the maintenance of the action.[20] In an action of this nature the acts constituting the *gravamen* of the charge must be set out. A petition alleging, for example, that the defendants, by conspiring together, etc., induced the plaintiff's wife to leave her home, states conclusions, and is demurrable.[21] Whether

[7] State v. Kelly, 74 Iowa, 589.

[8] Caldwell, J., in R. Co. v. Henson, 7 C. C. A. 349. And see Martin v. South. Pac. Co., Cal. 285, 62 Pac. Rep. 515, where recovery by the husband as the head of the community was sustained.

[9] Fleming v. Shenandoah, 67 Iowa, 505, 56 Am. Rep. 354.

[10] Cooley's Elements of Torts, 80.

[11] City St. R. Co. v. Twinane, 121 Ind. 375, 7 L. R. A. 352.

[12] Hyatt v. Adams, 16 Mich. 180.

[13] Cooley's Elements of Torts, 78; Cross v. Grant, 62 N. H. 675, 13 Am. St. Rep. 607.

[14] Rinehart v. Bills, 82 Mo. 584, 52 Am. Rep. 385. See the cases of Neville v. Gile and Lellis v. Lambert, *infra*.

[15] Egbert v. Greenwolt, 44 Mich. 645, 38 Am. Rep. 360. The action against one living in adultery with the plaintiff's wife is not barred by the lapse of the statutory period since the enticement, the wrong being continuing. Bailey v. King, 27 Ont. App. 703.

[16] Ferguson v. Smethers, 70 Ind. 519, 36 Am. Rep. 186; Sieber v. Pettitt (Pa.), 49 Atl. Rep. 763.

[17] Prettyman v. Williamson, 39 Atl. Rep. 731.

[18] Bedan v. Turney, 99 Cal. 649. It had been held in a recent case, Lord v. Lord, 69 Law J. Prob. 54, that ignorance that the woman was married cannot protect the co-respondent, but may be considered by the jury as justifying a reduction of damages.

[19] Cooley's Elements of Torts, 78; Prettyman v. Williamson (Del.), 39 Atl. Rep. 731.

[20] Prettyman v. Williamson, 39 Atl. Rep. 731.

[21] Mead v. Hoskins, 6 Ohio N. P. 522.

the damages in such a case shall be large or small must depend in each case on the circumstances peculiar to that case. The amount to be awarded depends largely on the previous relations of the husband and wife. If these have been such as usually exist where the parties have a proper sense of the obligations and responsibilities that belong to the marriage relations, the injury done to the husband by the seduction of the wife is vastly greater than it would have been if, by his abuse and misconduct, he had forfeited his right to her affections.[22] In order to lessen damages by showing misconduct on the part of the husband it must be shown that he was guilty of some wrong to the wife herself.[23] It may be shown in mitigation of damages that the plaintiff failed to support his wife, that their relations had always been unhappy, and that they were in fact living apart.[24] In a recent case $5,000 was held an excessive verdict, in view of the relations and conduct of the husband and wife.[25]

Considerable latitude is allowed in the reception of evidence in these cases. Letters which passed between the defendant and plaintiff's wife are admissible.[26] A statement made by the wife, at the time she was found at the defendant's house, as to the state of her affections towards plaintiff and defendant, may be received to show loss of affection for plaintiff, but when such statements are not made in the defendant's presence they are not admissible to show his agency.[27] It may be shown that defendant visited the plaintiff's wife after she had left her husband. Subsequent conduct, in cases of this nature, tend to show motives and relations existing at the time, and to reflect light on the previous relations of parties.[28] If the preponderance of the evidence is with the plaintiff he is entitled to recover.[28a]

Some of the courts have recognized that there is such a thing as a partial alienation of affection. This term is applied to that condition where the wife, not having any affection for her husband, not living in concord with him, is sought by a third party who gains her affections and entices her still farther from her duties. It is said that, in such a case, no one has the right to interfere and cut off the husband from any chance of gaining his wife's affection at some time in the future.[29]

A divorce is not a bar to an action for criminal conversation, the acts complained of having taken place before the granting of the divorce.[30] The divorce might be the means of perfecting his right of action, the action being for the destruction of, and injury to, the plaintiff's marital relations, and not being based upon their continued existence.[31] In Michael v. Dunkle,[32] which was an action of criminal conversation accomplished after a final separation from the wife, followed before the commencement of the action by a divorce granted to her, because of his cruelty, the husband was entitled to recover, the court saying that it would not be in the interests of good order and public morals to permit the seducer of a wife to set up a disagreement or even a separation between her and her husband as a complete defense.

Actions by the Wife.—It cannot be said that the common-law rule recognizing the right of the husband to inflict personal chastisement upon the wife has never been recognized in this country.[33] But this relic of barbarism has long since sunk into oblivion under the weight of reprobation which it richly deserved.[34] The wife cannot maintain an action against the husband for a personal tort, even after divorce.[35] Her wrongs in this respect may be redressed by the intervention of the criminal law, and if the husband imposes upon her a restraint constituting imprisonment she may be relieved by *habeas corpus*.[36] Formerly, the wife could not maintain an action except in conjunction with her

[22] Cooley's Elements of Torts, 78. And see Cole v. Beyland, 67 N. Y. S. 1024.
[23] Norton v. Warner, 9 Conn. 172.
[24] Prettyman v. Williamson, 39 Atl. Rep. 731.
[25] Bathke v. Krassin, 80 N. W. Rep. 950.
[26] Holty v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791; Fratini v. Caslini, 66 Vt. 273.
[27] Rose v. Mitchell, 43 Atl. Rep. 67.
[28] Rose v. Mitchell, 43 Atl. Rep. 67.
[28a] Sieber v. Pettitt (Pa.), 49 Atl. Rep. 763.
[29] Dallas v. Sellers, 17 Ind. 479, 79 Am. Dec. 489; Fratini v. Caslini, 66 Vt. 275, 44 Am. St. Rep. 843.
[30] Prettyman v. Williamson, 39 Atl. Rep. 731.
[31] Wales v. Whimer, 89 Ind. 121.
[32] 84 Ind. 544.
[33] See State v. Rhodes, 1 Phil. (N. Car.) 453, 98 Am. Dec. 78.
[34] Com. v. McAfee, 108 Mass. 458, 11 Am. Rep. 383; Poor v. Poor, 8 N. H. 307.
[35] Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27.
[36] Main v. Main, 46 Ill. App. 106.

husband for injuries sustained in her person, and damages recovered by husband and wife suing jointly were the property of the husband.[37] Now, however, many courts hold that, as a result of the married women's property acts, under which the husband acquires no interest in the property of his wife, he loses the right to recover for injuries to her person. The wife, in jurisdictions where this view is adopted, may sue alone,[38] but if she is engaged in no separate employment the loss of her time resulting from the injury cannot be reckoned as an element of damage.[39] Elsewhere it is held that the right of action arising from a personal injury is not a property right, and, therefore, not affected by the married woman's property acts.[40]

The wife may not recover for loss of time wherein she might have rendered service to her husband. "But that will not prevent her from recovering for all those things which injure her, apart from a mere loss of service and society to which the husband is entitled. Physical disability is a personal loss apart from being a deprivation of a money-earning power.[40a]

That, by the common law, the husband had his remedy against anyone who should step in between his wife and himself and interfere with his domestic happiness, we have seen. But the converse was not true. For the wife who was deprived of the society and care of her husband, whose affections were alienated from her, the common law provided no redress. And in England, to this day, the rule remains unchanged, notwithstanding the protests of jurists who have condemned the inhumanity of the law in this regard.[41] Fortunately for our self-respect and the good of society almost every court in this country, that has had occasion to pass on this question, has taken a stand in conformity with the trend of public opinion and in harmony with the general spirit of our laws. So it may be said to be the American doctrine that the wife is injured, and that she has a remedy, when the affections of her husband are alienated from her, and she is deprived of his society and care. Some courts sustain the right of action on the ground that the statutes have removed the disabilities of married women.[42] In other jurisdictions the action is allowed independent of any statute. The case of Bennett v. Bennett[43] is a leading case in this line of authority. There the court sustained its position by this reasoning: "His [the husband's] right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives each the same right in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation, not only of a natural right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy not provided by statute, but springing

[37] Hyatt v. Adams, 16 Mich. 180.

[38] Hovey v. C., B. & Q. R. Co., 59 Fed. Rep. 423; C., B. & Q. R. Co. v. Dunn, 52 Ill. 260, 4 Am. Rep. 606; Stevenson v. Morris, 37 Ohio St. 10, 41 Am. Rep. 481. Athens v. Smith, 111 Ga. 870.

[39] Denton v. Ordway (Iowa), 79 N. W. Rep. 271.

[40] Pennsylvania R. Co. v. Goodenough (N. Car.), 22 L. R. A. 460 and note. In California it is held that the damages recovered in such an action are community property. McFadden v. Santa Anna, etc. R. Co., 87 Cal. 464, 11 L. R. A. 252. See Humphrey v. Pope, *infra*, in connection with this ruling.

[40a] Cullar v. M., K. & T. R. Co., 84 Mo. App. 340, per Ellison, J.

[41] Lynch v. Knight, 9 H. L. Cas. 577; Pollock on Torts, 208.

[42] Belser v. Belser, 186 Ill. 537, 58 N. E. Rep. 249; Clow v. Chapman (Mo.), 26 L. R. A. 412; Holmes v. Holmes, 133 Ind. 386; Warren v. Warren, 89 Mich. 123, 14 L. R. A. 545; Nehroff v. Nehroff, 26 Fed. Rep. 15; Hodgkinson v. Hodgkinson (Neb.), 61 N. W. Rep. 577. And the declaration states a cause of action in alleging a loss of *consortium*. Knapp v. Wing, 72 Vt. 334, 47 Atl. Rep. 1075. In Humphrey v. Pope, 122 Cal. 253, 54 Pac. Rep. 848, the right of the wife to sue is asserted, even though in that state the damages, when recovered, must go into the community. In Maryland such an action is authorized by § 5, art. 45 of the Code, as amended by Act 1898, ch. 458, under which married women may sue "for torts committed against them as fully as if they were unmarried." And they may maintain the action though the cause of action arose before the act took effect. Wolf v. Frank, 92 Md. 138, 52 L. R. A. 102. As to the nature of the evidence admissible in cases of this class, and the weight to be attached to it, see, in addition to the cases already cited in this note, Lewis v. Hoffmann, 66 N. Y. S. 428; Knapp v. Wing, 72 Vt. 334, 47 Atl. Rep. 1075; Ash v. Prunier, 105 Fed. Rep. 722, 44 C. C. A. 675; Reading v. Gazzam (Pa.), 49 Atl. Rep. 889.

[43] 116 N. Y. 584, 6 L. R. A. 533.

from the flexibility of the common law and its adaptability to the changed nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle and are caused by acts of the same nature as those of the husband, the remedy should be the same."[44] Two states have, by recent decisions, separated themselves from the general current of American authority.[45] The decision in Duffies v. Duffies was placed on the ground that the wife had no such right, either by the common law or by statute. Doe v. Roe denied the right of action on the ground of public policy, and more particularly because not allowed by statute. The position of these courts seems very weak when viewed in the light of the reasoning of Bennett v. Bennett, Westlake v. Westlake, Nehroff v. Nehroff, and the other cases of that line, and bars the progress of the law of the domestic relations at a point where conservatism can serve no good end, where the defect in the law is reminiscent of the dark ages and where the evil is monstrous.

In Massachusetts, alienation of affections is not alone a sufficient cause of action, but is merely a fact which may be shown in aggravation of damages for loss of the *consortium*. And the loss of *consortium* must be alleged, adultery being the essential fact to be proved.[46]

In one state at least it has been held that the rule allowing the action for alienation of affections does not justify the maintenance of an action in the nature of criminal conversation by a wife against another woman. Such an action it is said, rarely serves any good purpose, is frequently the cause of misery to the innocent, and is contrary to public policy.[47]

Frequently, prehaps generally, the defendants in an action by the wife for the alienation of her husband's affections are the parents of the husband. In such a case it is important to determine whether the parent was moved by malice or by proper parental anxiety to secure the welfare and happiness of his child. Malice cannot be inferred from the fact that no ground for divorce existed. The father stands in a very different relation towards his married son or daughter than a stranger would occupy. Natural affection implies that the advice and counsel extended to them is prompted by good motives. Unworthy objects cannot be presumed; they ought to be positively shown or necessarily deduced from the facts and circumstances detailed. When disagreements arise between husband and wife the law recognizes the right of the parent to advise his son or daughter, and when such advice is given in good faith and results in a separation, the act does not give the injured party a right of action. These rules apply with proper modification when the wife is the plaintiff as well as where suit is brought by the husband, and the defendant is entitled in every such case to have the jury pass on his motives,[48] and the courts are particular to give full protection to the parental rights. For example, in a recent case,[49] it was held that annoying and insulting conduct towards the plaintiff by her husband's relatives was not sufficient to maintain the action, though, in fact, the home—which was the common home of parents and son—was made too uncomfortable for her to live in, it not being shown that her husband's affections were lost to her. It may be remarked that though, in this case, the husband urged his wife not to leave the common home, it does not appear that she was not justified in leaving, nor that

[44] See also Westlake v. Westlake, 34 Ohio St. 621; Foot v. Card, 58 Conn. 1, 6 L. R. A. 829; Seaver v. Adams (N. H.), 19 Atl. Rep. 776.

[45] See Duffies v. Duffies, 76 Wis. 374, 8 L. R. A. 420; Doe v. Roe, 82 Me. 503, 8 L. R. A. 833; Morgan v. Martin (Me.), 42 Atl. Rep. 354.

[46] Neville v. Gile (Mass.), 54 N. E. Rep. 841. In Lellis v. Lambert, 24 Ont. App. 653, Osler, J., said: "The loss of a wife's affections, not brought about by some act on the defendant's part, which necessarily caused or involved the loss of her *consortium*, never gave a cause of action to the husband. His wife might permit an admirer to pay her attentions, frequent her society, visit at her home, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live with him, and so far as she could bring it about, in the breaking up of his home, and yet there being no adultery, and no 'procuring or enticing,' or 'harboring and secreting' of the wife, no action lay at the suit of the husband against the man."

[47] Kroessin v. Keller (Minn.), 62 N. W. Rep. 438. But see Seaver v. Adams, (N. H.), 19 Atl. Rep. 776.

[48] Eagan v. Eagan (Kan.), 57 Pac. Rep. 942; Tucker v. Tucker (Miss.), 19 South. Rep. 955; Gernerd v. Gernerd, 185 Pa. St. 233; Oakman v. Belden, 94 Me. 280, 47 Atl. Rep. 553.

[49] Avery v. Avery, 81 N. W. Rep. 778.

he made any effort to make a comfortable home for her or to live with her elsewhere. In Young v. Young,[50] it was held that the action could not be maintained against the husband's parents on evidence that the defendants drove the plaintiff from their home and permitted the son to remain there, that his mother two days thereafter told plaintiff's father that her son would no longer live with the plaintiff, and that thereafter the husband failed to keep an engagement to meet the plaintiff, and that his mother asked a person to use influence to keep her son from living with the plaintiff.[51]

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[50] (Wash.) 35 Pac. Rep. 892.

[51] And see Sheriff v. Sheriff (Okla.), 56 Pac. Rep. 960; Kuhn v. Hemman, 59 N. Y. 341. See further, Derham v. Derham (Mich.), 83 N. W. Rep. 1005.

EXECUTION — LEVY ON CHATTELS — YOUNG OF MORTGAGED ANIMALS — AGREEMENT FOR LIEN.

BATTLE CREEK VALLEY BANK v. FIRST NAT. BANK OF MADISON.

Supreme Court of Nebraska, November 20, 1901.

A provision in a mortgage of domestic animals, assuming to give the mortgagee a lien upon the increase to be thereafter begotten, is nothing more than an agreement for a lien, which, without possession, vests no legal right to, or interest in, such increase.

SULLIVAN, J.: The judgment here presented for review was rendered in an action of replevin commenced before a justice of the peace, and, after trial, removed by appeal to the district court. The property in controversy is twenty-two head of hogs, which the owner, Dufphey, raised upon his farm in Madison county. These hogs are claimed by the plaintiff, the Battle Creek Valley Bank, by virtue of a mortgage which it had upon their dams before they were littered or conceived. The defendant bank is a judgment creditor of Dufphey, and it asserts a right of possession under an execution issued upon its judgment. The trial court found in favor of the defendant.

Having made a good levy, the sheriff was, at the commencement of the action, entitled to the possession of the hogs unless the plaintiff had a valid lien by virtue of its mortgage. On principle, it would seem, this question should not be difficult of solution. Things which have neither an actual nor potential existence are not the subject of sale or mortgage. Benj. Sales, § 78; Jones, Chat. Mortg. § 138. A grant of them cannot operate *in præsenti*. An instrument which assumes to convey or incumber a thing which has not even a potential existence must be regarded as a mere executory contract. And whatever might be the *status* of these contracts in courts of equity, where that is considered done which ought to be done, it is well settled, both in this country and England, that they do not create any legal right to, or interest in, the thing to which they relate, without what is called by the old writers "a new intervening act." The offspring of domestic animals, it is true, belong to the owner of the dam (2 Bl. Comm. 390; 2 Cycl. Law & Proc. 309); but a chattel mortgage in this state does not transfer title to the mortgagee (Musser v. King, 40 Neb. 892, 59 N. W. Rep. 744, 42 Am. St. Rep. 700; Bedford v. Van Cott, 42 Neb. 229, 60 N. W. Rep. 572; Randall v. Persons, 42 Neb. 607, 60 N. W. Rep. 898); it only creates a lien, and consequently the young of mortgaged animals, when brought forth, belong to the mortgagor. The case of a mortgage given during gestation may, perhaps, constitute an exception to the ru e, but this we do not decide. It was held in Cole v. Kerr, 19 Neb. 555, 26 N. W. Rep. 598, that the lien of a chattel mortgage on a crop of corn not planted will not attach to the crop when it comes into existence, unless possession is taken by the mortgagee. "Until then," it is said, "it remains a mere license, and, until acted upon, it conveys neither a lien nor right of property which the mortgagee can assert against a purchaser or execution creditor." It is true, of course, as suggested by Mr. Justice Cobb in the case last mentioned, that in this latitude the field will not fructify without labor. It must be diligently cultivated, and seed must be sown. But it is equally true that domestic animals cannot be made to breed without human endeavor. A union must be brought about between the male and the female, and they must be given shelter and sustenance or they will perish It is, indeed, too plain for argument that labor is no more a factor in raising crops than in raising live stock. But the real ground of the decision in Cole v. Kerr is not that the mortgage on unplanted crops is a mortgage on labor, but that the thing mortgaged has no existence, and is, to use the language of Lord Bacon, "no interest at all, but a mere future." Steele v. Ashenfelter, 40 Neb. 770, 59 N. W. Rep. 361, 42 Am. St. Rep. 694. This view of the matter is, we know, opposed to the rule laid down by Jones and Herman (Jones, Chat. Mortg. § 149; Herm. Chat. Mortg. § 44); but it is fully supported by a very lucid and logical opinion recently handed down by the Supreme Court of California (Shoobert v. De Motta, 112 Cal. 215, 44 Pac. Rep. 487, 53 Am. St. Rep. 207). Our conclusion upon the whole case is that, the plaintiff having failed to obtain possession—having failed to secure the lien for which it had contracted—until after the levy of the execution, the defendant has the superior right, and was, therefore, entitled to succeed in the action.

NOTE—*When a Chattel Mortgage of Animals Will Cover their Natural Increase.*—The conflict of au-

thority on the question of law stated in the subject of this annotation is probably due as suggested in the principal case to the point of view from which a mortgage is regarded, either as transferring title or as merely conferring a lien. It is a fundamental rule in the law of animals that the increase of all domestic animals belongs to the owner of the dam. Edmonston v. Wilson, 49 Mo. App. 491; Morris v. Coburn, 71 Tex. 406; Meyer v. Cook, 85 Ala. 417; Leavitt v. Jones, 54 Vt. 423; Rogers v. Highland, 69 Iowa, 504, 29 N. W. Rep. 429; Arkansas, etc. Co. v. Mann, 130 U. S. 69. Following this rule it would seem that a chattel mortgage of animals would, if we consider a mortgage as a transfer of title, cover all increase during the continuance of the mortgage lien. The contrary, however, would seem to be the correct rule where no transfer of title is presumed from the execution of a mortgage and the ownership of the animals remained in the mortgagor. Another principle, however, not in relation to the law of animals but of chattel mortgages, must be considered. At common law, a mortgage can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor or potentially belonging to him as an incident of other property then in existence and belonging to him. Jones on Chattel Mortgages, § 138. There can be no doubt, the court in the principal case to the contrary notwithstanding, that the increase of an animal in being is itself *potentially* in in existence, and is, therefore, an incident of property in animals. Meyer v. Cook, 85 Ala. 417; Forman v. Proctor, 9 B. Mon. 124; Darling v. Wilson, 60 N. H. 59; Cahoon v. Miers, 67 Md. 573.

It is the general rule, therefore, that a mortgage of domestic animals will cover all offspring of such animals, where dam is under the mortgage at the time of parturition, even though the mortgage is silent as to such increase. Meyer Bros. v. Cook, 85 Ala. 417; Funk v. Paul, 64 Wis. 35, 24 N. W. Rep. 419; Dyer v. State, 88 Ala. 225; Cahoon v. Miers, 67 Md. 573; First Nat. Bank v. Investment Co., 86 Tex. 636, 26 S. W. Rep. 691; Forman v. Proctor, 48 Ky. 124; Gundy v. Biteler, 6 Ill. App. 510; Pyeatt v. Powell, 51 Fed. Rep. 551. Thus a mortgage of a mare is a lien on colts afterwards foaled, whether after or before the mortgagee takes possession under the mortgage, as against one having the equitable title to the mare, in favor of a mortgage who is a *bona fide* purchaser for value. Meyer v. Cook, 85 Ala. 417. So also where chattel mortgage is executed upon the dams of colts before the latter are foaled, the mortgage attaches to the colts until they are weaned, and until then they are not liable to attachment by a creditor of the mortgagor. Rogers v. Highland, 69 Iowa, 504. In Cahoon v. Miers, 67 Md. 573, the court held that since a chattel mortgage, properly recorded, transfers title though the mortgagor remain in possession, the title to the offspring of animals included in such mortgage is in the mortgagee. So, also, as between the parties to a mortgage on a mare which is silent as to the ownership of her increase. The mortgagee is the owner thereof, subject to the terms of the mortgage, though the mare remained in the mortgagor's possession, and was bred by him after the execution of the mortgage, and without notice to the mortgagee. Ellis v. Reaves, 94 Tenn. 210, 28 S. W. Rep. 1089. In the recent case of Gannaway v. Tate, 98 Va. 789, 37 S. E. Rep. 768, it was held that the grantee in a trust deed conveying certain ewes, which makes no mention of their increase, has a right to such increase which is superior to that of an attaching creditor. So, also, in a recent case in the United States Supreme Court, Northwestern Bank v. Freeman, 171 U. S. 620, Justice McKenna, speaking for the court, holds broadly that under the rule that the incident follows the principal, a mortgage of domestic animals covers the increase of such animals, though it is silent as to such increase.

A peculiar phrase of this question arises in considering how long the lien is operative on the increase as against a *bona fide* holder, where no mention of such increase is incorporated in the mortgage. The leading case on this question is Funk v. Paul, 64 Wis. 35, where the court holds that where a mortgage on domestic animals, given during the period of gestation, contains no provision as to increase, the mortgagee, as against the mortgagor, is entitled to the increase, even after the young have ceased to follow the mother for their nature; but that in such case the mortgagee is not entitled to the increase as against one who in good faith purchased the increase after it had been separated from the mother. Thus, where a mortgage of two cows, duly recorded, failed to include the increase, and the mortgagor sold the increase when eighteen months old, it was held that the mortgage would not defeat the sale. Winter v. Landphere, 42 Iowa 471. See also to same effect: Gundy v. Biteler, 6 Ill. App. 510; Enright v. Dodge, 64 Vt. 502; Forman v. Procter, 9 B. Mon. (Ky.) 124; Rogers v. Gage, 59 Mo. App. 107; Darling v. Wilson, 60 N. H. 59, 49 Am. Rep. 305. This last case, however, went further than the others and declared "that there being nothing in the mortgage showing an intention to create a lien upon the increase of stock mortgaged, the lien existing only as an incident to the mortgage, would, as *between the parties*, continue so long only as is necessary for the suitable nurture of the increase." The court, in Funk v. Paul, *supra*, in criticising this declaration, says: "To our minds this view cannot be sustained on sound principles. The lien was created by the mortgagee, and, so far as the mortgagor is concerned, was entirely independent of the nurture. Such nurture did not give the lien, and its termination could not take it away as against the mortgagor. As to such mortgagor the question of notice or insufficiency of description is not involved, for he had actual notice that such increase was, in fact, covered by the mortgage. But as to subsequent *bona fide* purchasers and mortgagees without notice the question is different. As to them, the period of nurture being passed, and the young being entirely separated from the mother, and not being mentioned in the mortgage, nor any longer connected with the mother covered by the mortgage, they have neither actual nor constructive notice of the mortgagor's rights and interests, nor anything to put them upon inquiry." We regard this as the fairest and most accurate statement of the rule upon this phase of the question.

The query of the court in the principal case that if the increase were conceived prior to the date of mortgage the rule might be different, is interesting. Although no courts have distinctly made many such conditions to the regular rule as announced in this query, the language of some courts have assumed it. Thorpe v. Cowles, 55 Iowa, 408; Funk v. Paul, 64 Wis. 35; Kellogg v. Lovely, 46 Mich. 131. We do not think any such distinction tenable. The increase of any animal is in *potential* existence before conception takes place. After conception and during the period of gestation it may practically be said to be *in esse*.

The case of Shoobert v. De Motta, 112 Cal. 215, cited

by the court in the principal case, denied the whole doctrine of the extension of a chattel mortgage over the increase of animals mortgaged on the ground that under the California Code the title to mortgaged property remains in the mortgagor, while the mortgagee has only a lien thereon. The court criticises the case of Austin, etc. Bank v. Mortgage Co.,86 Tex. 636, where a different result was reached under a similar statute. On principle, as we have already suggested, we believe the position of the California court to be unassailable. For, if the mortgagee by virtue of their mortgage derives no title to the animals mortgaged, the increase cannot logically come within the burden of his lien but should pass unincumbered to the mortgagor, the owner of the dams. For that reason also the distinction sought to be made between the young of mortgaged animals before and after nurture is illogical.

JETSAM AND FLOTSAM.

JAILS THE SCHOOL FOR CRIME.

It is to be hoped that the period of self-examination upon which we have entered will lead to a true appreciation of other social menaces than that threatening from the anarchists' camp. If the suppression of those who incite to violence against government be a necessity what shall be said of measures to prevent the multiplication of the brood of ordinary criminals who threaten the life and property of the common man throughout the land. Our toleration of anarchistic propaganda is hardly more culpable than the general indifference to conditions which directly foster criminality in the ordinary sense of the word. We are reminded of this by the severe condemnation of our prison system by the Howard Association of England in its latest utterances. After a thorough examination of reports from a majority of our states, the experts of this association pronounce our country jails "the worst institutions of the kind in the world," and the conclusion is based upon studies at first hand by men qualified for the work.

The chief indictment which the English experts find against our county jails (and it should be remembered that an overwhelming number of prisoners are housed in them) is the indiscriminate herding of inmates of all ages and grades and their enforced idleness. In other words, the county jails supply the very best conditions for the cultivation of criminal instincts and the graduation of resourceful crooks. This is an oft-told tale which could easily be elaborated, yet the county jail, in charge of an appointee whose chief qualification is of a political nature, remains as a monument to public indifference about a vital subject.

It is not to be wondered at that the Howard Association views with suspicion our general methods of treating wrongdoers as tending to increase rather than to diminish crime, although it seems questionable how far the decrease in Great Britain is attributable to the so-called "severe justice of British punitive measures." At all events our critics are more than justified in pointing to the need of prison reform in the United States if it be our aim to diminish crime. This is said with a full knowledge of the progress already made. In reformatory work we have set some notable examples, and in the wider field of penal reform we have hit upon some discoveries of inestimable value, such as the indeterminate sentence and the probation system. Yet, as a whole, our prison system is bad.

Even Japan shames us. According to Kiego Kiyoura, ex minister of justice, Japan has realized some ideals in prison administration which we still hold merely as theories. It has centralized its prison administration, securing the advantages of uniformity and economy which centralization affords. It has established a school for the training of higher prison officials, with a programme in penology, prison hygiene, criminal psychology, statistics, anthropometry, the maintenance of ex-convicts, methods of reformation and practical drill in prison management. It has an association with more than 10,000 members for the purpose of improving persons, not to mention local committees and societies for the aid of discharged convicts. Some of the things we most need, little Japan has already realized—foremost among them what corresponds to state control as opposed to county control and a higher training of prison officials whose tenure of office is divorced from local politics.—*Boston Transcript.*

BOOKS RECEIVED.

The American State Reports, containing the cases of general value and authority subsequent to those contained in the "American Decisions" and the "American Reports," decided in the courts of last resort of the several states. Selected, reported, and annoted, by A. C. Freeman, and the associate editors of the "American Decisions." Vol. LXXXII. San Francisco. Bancroft-Whitney Company, Law Publishers and Law Booksellers, 1902.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

1. ACCORD AND SATISFACTION—Allegation of Performance.—A plea of accord and satisfaction in action on a promissory note is bad, where performance to be received in satisfaction is not alleged.—Perdew v. Tilma, Neb., 88 N. W. Rep. 123.

2. ACTION — Joint Complainants.—All joint complainants must recover, or none.—Richter v. Noll, Ala., 30 South. Rep. 740.

3. ADVERSE POSSESSION — Limitations. — Where grantee goes into possession under a deed intended as a mortgage, a bill after 10 years to establish it as a mortgage held barred by limitation.—Richter v. Noll, Ala., 30 South. Rep. 740.

4. ADVERSE POSSESSION—Vendor Taking Possession after Default.—Where vendor, after default, takes possession and retains it for 10 years without accounting, held the possession is adverse.—Love v. Butler, Ala., 30 South. Rep. 735.

5. APPEAL AND ERROR — Appeal from Judgment Alone.—Where an appeal is from the judgment alone, the only question presented is whether the pleadings and findings support the judgment.—Coleman v. Stalnacke, S. Dak., 88 N. W. Rep. 107.

6. APPEAL AND ERROR—Change of Theory.—A theory different from that on which case was tried, and on which no issue was formed, cannot be urged first on appeal.—Dunnigan v. Green, Mo., 65 S. W. Rep. 287.

7. APPEAL AND ERROR — Delay in Filing Transcript. —Where transcript is not filed within 60 days after appeal, it will be dismissed, unless some cause is shown. —Taylor v. McCormick, Idaho, 66 Pac. Rep. 605.

8. APPEAL AND ERROR—Findings Contrary to Evidence.—Judgment on findings contrary to evidence will not be directed on appeal in conformity with the evidence, in absence of motion in the trial court to correct the answer given.—Byington v. City of Merrill, Wis., 88 N. W. Rep. 26.

9. APPEAL AND ERROR—Looking Behind Bill of Exceptions.—The court on appeal cannot look beyond a transcript and bill of exceptions to discover what occurred at the trial.—Kuker v. Beindorff, Neb., 88 N. W. Rep. 190.

10. APPEAL AND ERROR — Restitution on Reversal.— Where a party has obtained property by a judgment afterwards reversed, the court should compel restitution by summary proceedings.—Horton v. State, Neb., 88 N. W. Rep. 146.

11. ASSAULT AND BATTERY — When Exemplary Damages Will be Awarded.—Where defendant, because of failure of plaintiff to return his salutation, abuses him, assaults him, and bites his ear off, actual and exemplary damages will be awarded.—Turnbow v. Wimberly, La., 30 South. Rep. 747.

12. ASSIGNMENTS — Assignee of Cost Bill.—Assignee of cost bill held to take it subject to any right of setoff existing at the time of the assignment.—Northwestern & P. Hypotheek Bank v. Rauch, Idaho, 66 Pac. Rep. 807.

13. ASSIGNMENTS—Order for Payment of Money.—An order for the payment of money, until accepted, is not an assignment, at law or in equity.—Hanchey v. Hurley, Ala., 30 South. Rep. 742.

14. ASSIGNMENTS—Payment Out of Particular Fund. —Promise to pay existing debts out of a particular fund held not to create a lien thereon or work an equitable assignment.—Phillips v. Hogue, Neb., 88 N. W. Rep. 180.

15. ATTACHMENT—Waiver by Lapse of Time.—Where a defendant in attachment filed after three years a plea in abatement on the ground that the sureties on the bond were not solvent, such lapse of time constituted a waiver of the alleged defect.—Wallace v. First Nat. Bank, Tex., 65 S. W. Rep. 190.

16. ATTORNEY AND CLIENT—Lien on Garnished Fund. —Attorney for defendant in an action where plaintiff had garnished funds held not entitled to a lien on the fund.—Phillips v. Hogue, Neb., 88 N. W. Rep. 180.

17. BAIL—Bail in Capital Cases.—In capital cases, accused is entitled to bail before trial as a matter of absolute right, unless proof of guilt is evident or presumption thereof great.—*In re* West, N. Dak., 88 N. W. Rep. 88.

18. BAIL — Who are not Subject to Bail.—Under Const. 1898, art. 12, and Rev. St. § 1007, only persons convicted of crime, and sentenced to death or imprisonment at hard labor, are to be kept in confinement pending appeal.—*Ex parte* State, La., 30 South. Rep. 746.

19. BANKRUPTCY — Amending Schedules.—A bankrupt will not be permitted to amend his schedules after his property has vested in the trustee, to claim additional exemptions for the benefit of certain creditors in whose favor he had waived his right of exemption.—Moran v. King, U. S. C. C. of App., Fourth Circuit, 111 Fed. Rep. 730.

20. BANKRUPTCY—Lien of Seller Retaining Title.—A seller of personal property under a contract retaining title until paymen held, under the law of Kentucky, to have a valid lien as against the trustee in bankruptcy of the purchaser, although his contract was unrecorded.—*In re* Sewell, U. S. D. C., E. D. Ky., 111 Fed. Rep. 791.

21. BANKRUPTCY — Surrender of Preferences.—A creditor who has received payments within four months must surrender the same before he can prove any claim, regardless of his good faith or the indebtedness on which they were paid.—*In re* Dickson, U. S. C. C. of App., First Circuit, 111 Fed. Rep. 726.

22. BANKS AND BANKING — Acceptance of Collateral from Defaulting Officer.—The majority of the directors of the national bank may, with the consent of the comptroller, accept collateral securities from a defaulting officer.—Tecumseh Nat. Bank v. Chamberlain Banking House, Neb., 88 N. W. Rep. 186.

23. BANKS AND BANKING—Failure to Demand Payment or Protest.—Where a bank failed to demand payment, or to protest a note sent to it for collection on which it was liable as indorser, and which had been placed on the footing of a bill of exchange, it became liable to the holder.—Louisville Banking Co. v. Asher, Ky., 65 S. W. Rep. 133.

24. BREACH OF MARRIAGE PROMISE — Reducing Verdict.—Discretion of judge in reducing verdict, in action for breach of marriage promise, of $6,000 to $4,000, conditional on grant of new trial, held not error.— Hahn v. Bettingen, Minn., 88 N. W. Rep. 10.

25. BUILDING AND LOAN ASSOCIATIONS—Notice of Incorporation Law.—A stockholder in a building and loan association is bound to take notice of the law under which it is incorporated, and of the provisions of its by-laws.—Columbia Building & Loan Assn. v. Junquist, U. S. C. C., D. Wyo., 111 Fed. Rep. 645.

26. CARRIERS—Duty to Drunken Passenger.—A railroad company held liable for putting a drunken passenger off at a dangerous place only if he was put off against his will or when he was incapable of having a will.—Bohannon's Admx. v. Southern Ry. Co. in Kentucky, Ky., 65 S. W. Rep. 169.

27. CARRIERS — Limitation of Liability.—Contract limiting liability of carrier for injury to freight to a fixed sum, not based on value of property, held invalid.—Ullman v. Chicago & N. W. Ry. Co., Wis., 88 N. W. Rep. 41.

28. CARRIERS — Repayment of Freight Charges.— Where defendant induces a common carrier by false representations to deliver articles received for transportation to him, held, *in detinue*, that he cannot insist on repayment of freight charges paid by him.— Louisville & N. R. Co. v. Walker, Ala., 30 South. Rep. 738.

29. CHATTEL MORTGAGES—Animals not in Esse.—In-

strument assuming to incumber animals not in being held not to create any legal right to or interest in the thing.—Battle Creek Valley Bank v. First Nat. Bank, Neb., 88 N. W. Rep. 145.

30. CHATTEL MORTGAGES — Validity Contested by Judgment Creditor.—Validity of chattel mortgage asserted by garnishee may be contested by judgment creditor.—Granger v. First Nat. Bank, Neb., 88 N. W. Rep. 121.

31. COMMERCE—Tax on Sleeping Car Companies.—Code 1892, § 3357, requiring sleeping car companies to pay privilege tax, held not unconstitutional, as affecting interstate commerce.—Pullman Palace Car Co. v. Adams, Miss., 30 South. Rep. 757.

32. CONFLICT OF LAWS—Contracts and Remedies.—Contracts and remedies are governed by the law of the state where the former are made and the latter are administered.—Lancashire Ins. Co. v. Barnard, U. S. C. C. of App., Eighth Circuit, 111 Fed. Rep. 702.

33. CONSPIRACY — Conspiracy to Defraud.—Conspiracy to defraud held a crime under the common law.—State v. Howard, N. Car., 40 S. E. Rep. 71.

34. CONSPIRACY—Proper Pleading in Civil Action.—In action for conspiracy, the pleader must allege, not only confederation and the doing of the wrongful act, but the facts from which damages result.—Commercial Union Assur. Co. v. Shoemaker, Neb., 88 N. W. Rep. 156.

35. CONSTITUTIONAL LAW—Appointment of Election Commissioners by Legislature.—Act March 11, 1898, regulating elections, was, to the extent that it provided for the appointment of election commissioners by the legislature, an invasion of the powers of the executive, and therefore unconstitutional.—Pratt v. Breckinridge, Ky., 65 S. W. Rep. 186.

36. CONSTITUTIONAL LAW — Legislative Powers of Judiciary.—Gen. Laws, 1897, ch. 88, § 6, relating to improvement of Lake Minnetonka, held not to impose legislative power on the judiciary.—McGee v. Board of Comrs. of Hennepin County, Minn., 88 N. W. Rep. 6.

37. CONSTITUTIONAL LAW — Relation between Two Counties Carved Out of One.—The question as to what liability there shall be between a new county and an old one from which it has been carved out, being in its nature political, there was no legal liability between the counties which any court had jurisdiction to adjudicate.—Riverside County v. San Bernardino County, Cal., 66 Pac. Rep. 788.

38. CONSTITUTIONAL LAW — Where Unconstitutional Part of Statute Does Not Affect Remainder.—Though Laws 1901, ch. 469, § 11, relating to the creation of Gates county, which locates the county seat, should be void, held, that the remainder of the act would not thereby be invalid.—State v. Stevens, Wis., 88 N. W. Rep. 48.

39. CONTRACTS — Construction of Ambiguities.—Before rule for choosing between two meanings in an expression in a contract can be applied, it must be determined that the meaning intended is obscure.—Ullman v. Chicago & N. W. Ry. Co., Wis., 88 N. W. Rep. 41.

40. CONTRACTS—Fraudulent Use of Lawful Contract.—One who has entered into a lawful contract in good faith held not precluded from relief because the other party may intend to make a fraudulent use of it as to a third party.—Fox v. State, Neb., 88 N. W. Rep. 176.

41. CONTRACT — Proof and Defenses.— In action for materials sold under a verbal contract, defendant under a general denial may show that the contract was made with, and the materials sold to a third person.—Wiedeman v. Hedges, Neb., 88 N. W. Rep. 170.

42. CORPORATIONS—Jurisdiction of Debt of Foreign Corporation.—A court has no jurisdiction of garnishment of a debt due by a foreign corporation, not contracted nor to be performed in the state, though debtor and creditor of garnishee voluntarily appear.—Louisville & N. R. Co. v. Steiner, Ala., 30 South. Rep. 741.

43. CORPORATION—Liability of Corporation for Debts of Constituent Corporation on Consolidation.—Corporation created by the consolidation of several corporations held to hold the property received from each constituent corporation as a trust fund for the payment of the debts of the original corporation.—Morrison v. American Snuff Co., Miss., 30 South. Rep 733.

44. CORPORATIONS—Liability for Debts of Corporation Whose Property Has Been Assigned.—Defendant corporation held liable for debts of another corporation, which transferred all its property to defendant, which took with knowledge of transferror's liabilities.—Vicksburg & Y. C. Tel. Co. v. Citizens' Tel. Co., Miss., 30 South. Rep. 723.

45. CORPORATIONS—Limitations on Right of Foreign Corporations to Do Business.—The legislature has authority to impose restrictions, not repugnant to constitution and laws of the United States, as conditions precedent to the right of foreign corporations to do business in the state.—Tolerton & Stetson Co. v. Ferguson, Minn., 88 N. W. Rep. 19.

46. CORPORATIONS—Preferring Director as Creditor.—A corporation is not precluded from preferring a *bona fide* creditor because he is also one of its directors, although the burden rests upon him to prove his absolute good faith and the justice of his demand.—American Exchange Nat. Bank v. Ward, U. S. C. C. of App., Eighth Circuit, 111 Fed. Rep. 782.

47. CORPORATIONS—Right of Minority Stockholders to Set Aside Fraudulent Contract of Majority.—A bill by minority stockholders to set aside a contract alleged to have been fraudulently obtained by the majority, and to transfer all the property of the corporation to them, under the name of a second corporation for an inadequate consideration, held to state a cause of action.—Mumford v. Ecuador Development Co., U. S. C. C., S. D. N. Y., 111 Fed. Rep. 639.

48. CORPORATIONS—Tranfer of Stock Sold on Foreclosure of Pledge.—Where stock is pledged by delivery of the certificates, the company can be compelled to make a transfer of the property by one who has acquired title by a valid sale.—Brown v. Hotel Assn. of Omaha, Neb., 88 N. W. Rep. 175.

49. COSTS—Action in Forma Pauperis.—The act permitting actions in the federal courts to be prosecuted *in forma pauperis* applies to proceedings on appeal or writ of error in such actions.—Reed v. Pennsylvania Co., U. S. C. C. of App., Sixth Circuit, 111 Fed. Rep. 714.

50. COSTS — Printing Unnecessary Matter in Transcript.—Where papers not properly a part thereof are printed in transcript, appellant will be required to pay the additional expense.—Taylor v. McCormick, Idaho, 66 Pac. Rep. 805.

51. COSTS — Subsequent Appeal. — Costs incurred upon one appeal cannot be properly taxed as part of the costs of an appeal subsequently taken.—Louisville Steam Forge Co. v. Mehler, Ky., 65 S. W. Rep. 129.

52. COUNTERFEITING— Necessary Allegations. — An indictment for having in possession, with intent to sell or use, obligations or securities engraved and printed after the similitude of obligations and securities of the United States, does not charge an offense, where it shows on its face that the instruments referred to are bills issued by a bank, and purporting to be its obligation, and not those of the government.—United States v. Conners, U. S. D. C., D. Oreg., 111 Fed. Rep. 734.

53. COUNTIES—Clerk to Furnish Transcripts.—Under Laws 1901, p. 435, a county clerk, required to furnish certain transcripts to another county, held not entitled to demand his compensation in advance.—Baker County v. Benson, Oreg., 66 Pac. Rep. 815.

54. COUNTIES—Fees of Officers in Tramp Cases.—Where county board had fixed fees of officers in tramp cases under Sanb. & B. Ann. St. ch. 65a, in suit by of

ficer to recover statutory fees, held not error to exclude his evidence as to reasonable value of his services.—Bartlett v. Eau Claire County, Wis., 88 N. W. Rep. 61.

55. COURTS—Board to Try Election Contests.—The legislature has no power to create a board to try election contests, as such a board exercises judicial powers, and is therefore a court.—Pratt v. Breckinridge, Ky., 65 S. W. Rep. 186.

56. COURTS—Presumption as to Subsequent Proceedings.—Where it appears a jurisdiction of inferior courts has attached, a presumption arises that subsequent proceedings were regular.—Kuker v. Beindorff, Neb., 88 N. W. Rep. 199.

57. CRIMINAL EVIDENCE—Res Gestæ.—Statement of deceased within two minutes of the fatal shot, and while deceased was in flight, as to the particulars of the difficulty, held admissible as part of the *res gestæ*.—Nelson v. State Ala., 30 South. Rep. 728.

58. CRIMINAL EVIDENCE—Res Gestæ.—Evidence as to being awakened at a certain hour by cries of murder held admissible as part of *res gestæ*.—People v. Amaya, Cal., 66 Pac. Rep. 794.

59. CRIMINAL LAW—Conviction Under Ordinance and Statute.—A conviction under a city ordinance is not a bar to a prosecution for the same act based on a state statute.—State v. Muir, Mo., 65 S. W. Rep. 285.

60. CRIMINAL LAW—Defense of Insanity.—Where the evidence is entirely inadequate to establish the defense of insanity, it is properly withdrawn from the jury's consideration.—State v. Morledge, Mo., 65 S. W. Rep. 226.

61. CRIMINAL LAW—Enabling Order.—Where the record did not contain a 10-day enabling order, the statement of facts filed subsequent to the adjournment of court will be struck from the record.—Ramsey v. State Tex., 65 S. W. Rep. 187.

62. CRIMINAL LAW—Evidence on Appeal.—In a criminal case, the evidence is exclusively for the jury, and is not reviewable on appeal.—State v. Jackson, N. Car., 40 S. E. Rep. 41.

63. CRIMINAL LAW—Sufficiency of Indictment of Appeal.—The sufficiency of an indictment will be reviewed on appeal, though no motion to quash or in arrest of judgment was filed and preserved.—State v. Hall, Mo., 65 S. W. Rep. 248.

64. CRIMINAL TRIAL—Right of Defendant to be Unshackled.—A conviction of murder should not be set aside because, during the selection of the jury and after court had adjourned, an officer put handcuffs on defendant when removing him from the court room.—State v. Craft, Mo., 65 S. W. Rep. 280.

65. CRIMINAL TRIAL—Separation of Jury.—A separation by a jury held insufficient to require a reversal of a conviction of manslaughter.—Exedia v. State, Tex., 65 S. W. Rep. 188.

66. DEATH—Abatement.—An action for wrongful death, under the Tennessee statute, abates and the right of action is extinguished, on the death of the statutory beneficiary in whose favor the right accured.—Sanders' admx. v. Louisville & N. R. Co., U. S. C. C. of App., Sixth Circuit, 111 Fed. Rep. 708.

67. DEATH—Excessive Verdict.—In an action for death by wrongful act, where deceased left a widow and four minor children, a verdict of $17,000 held not excessive.—Galveston, H. & S. A. Ry. Co. v. Davis, Tex., 65 S. W. Rep. 217.

68. DEATH—Measure of Damages.—In an action for wrongful death, the measure of damages is such a sum of money as, if paid now, would fairly compensate plaintiffs for the pecuniary loss sustained.—San Antinio & A. P. Ry. Co. v. Waller, Tex., 65 S. W. Rep. 210.

69. DEPOSITIONS—Reading Deposition Not Used by Other Party.—A deposition, not used by party taking it, may be read by the other party.—Ulrich v. Mc Conaughey, Neb., 88 N. W. Rep. 150.

70. DISMISSAL AND NONSUIT—Conditions.—Whenever justice requires imposition of terms, or retention of case on the docket, the court may impose terms, or refuse to permit dismissal.—Horton v. State, Neb., 88 N. W. Rep. 146.

71. DIVORCE—Support of Child After Divorce.—Discretion of court as to an amount to be allowed for support of a divorce will not be reviewed.—Setzer v. Setzer, N. Car., 40 S. E. Rep. 62.

72. DOWER—Assignment in Partition Proceedings.—A widow, made a party to partition proceedings, held entitled to have her dower assigned before the parties could sell.—Seaman v. Seaman, N. Car., 40 S. E. Rep. 41.

73. DOWER—Limitations.—An action for dower in the district court must be brought within ten-year statute of limitations.—Beall v. McMenemy, Neb., 88 N. W. Rep. 184.

74. ELECTIONS—De Facto Election Officers.—Though the legislature had no power to appoint a board of election commissioners, yet, as it did so, and the persons thus appointed acted and were recognized as such, they were *de facto* officers, and their acts were valid as to the public and third persons.—Pratt v. Breckinridge, Ky., 65 S. W. Rep. 186.

75. EMBEZZLEMENT-Essential Elements under National Bank Laws.—An intent to injure or defraud the association is made by Rev. St. § 5209, an essential element of the offense of embezzlement by an officer of a national bank.—McKnight v. United States, U. S. C. C. of App., Sixth Circuit, 111 Fed. Rep. 735.

76. EMBEZZLEMENT—Necessary Allegation in Indictment.—In indictment against employee of corporation for embezzlement under Pen. Code, § 188, held unnecessary to state that accused was employed in the house or place of business of the corporation, or from whom he received the money.—Hayes v. State, Ga., 40 S. E. Rep. 18.

77. EQUITY—Defense of Bona Fide Purchaser.—Defense of *bona fide* purchaser can be raised in equity only by plea of answer.—Hanchey v. Hurley, Ala., 30 South. Rep. 742.

78. EQUITY—Reopening Case for Additional Testimony.—After a cause has been heard, and the court had pronounced what its findings would be, held not abuse of discretion to refuse to permit an amendment involving the reopening of the case for additional testimony and to effect a different result.—Prehm v. Porter, Mo., 65 S. W. Rep. 264.

79. ESTOPPEL—Conveyance Subject to Incumbrances.—Where property is conveyed subject to incumbrances, it does not estop grantee to assert invalidity of apparent lien.—Batty v. City of Hastings, Neb., 88 N. W. Rep. 139.

80. EVIDENCE—Expert Testimony as to Effect of Alcohol.—The testimony of physicians as to the effect of alcoholism upon the will power held admissible for the contestants of a will, though based upon what the medical authorities say upon the subject.—Murphy's Exr. v. Murphy, Ky., 65 S. W. Rep. 165.

81. EVIDENCE—Parol Variation of Journal Entries.—Parol evidence held inadmissible to supply omission in journal entries to show passage of ordinance.—Pickton v. City of Fargo, N. Dak., 88 N. W. Rep. 90.

82. EVIDENCE—Res Gestæ.—In an action for death by wrongful act, the statements of deceased, made immediately after the accident, are admissible as *res gestæ*.—Galveston, H. & S. A. Ry. Co. v. Davis, Tex., 65 S. W. Rep. 217.

83. EVIDENCE—Secondary Evidence of Contents of Documents.—Where pleadings show contents of document in possession of adverse party must be established, notice to produce held unnecessary in order to permit introduction of secondary evidence.—Nichols & Shepard Co. v. Charlebois, N. Dak., 88 N. W. Rep. 80.

84. EXCEPTIONS, BILL OF—Judge Assigning Ground for Rulings.—A judge can, on presentation of bill of

exceptions to his rulings, assign his ground therefor.—State v. Foster, La., 30 South. Rep. 749.

85. EXECUTION — Notice of Sale.—Notice of sale on execution need not contain statement of amount due.—Stull v. Seymour, Neb., 88 N. W. Rep. 174.

86. EXECUTION—Physical Seizure.—Physical seizure held not necessary to validate a levy of execution on chattels.—Battle Creek Valley Bank v. First Nat. Bank, Neb., 86 N. W. Rep. 145.

87. EXECUTORS AND ADMINISTRATORS—Right of Public Administrator.—An order, made the next day after the death of an intestate, placing his estate in the hands of the public administrator, held void.—Underwood v. Underwood's Admr., Ky., 65 S. W. Rep. 130.

88. EXEMPTIONS—Personal Property.—The head of a family, who has no real property subject to execution, held entitled to have exempt from sale $500 of personal property.—McCormick Harvesting Mach. Co. v. Dunn, Neb., 88 N. W. Rep. 150.

89. FACTORS AND BROKERS — When Entitled to Commission.—Real estate broker held not entitled to commission, unless he procured purchaser able, ready, and willing to complete purchase on authorized terms.—Fairchild v. Cunningham, Minn., 88 N. W. Rep. 15.

90. FORGERY—Failure to Affix Revenue Stamp.—It was proper to refuse to instruct that, if the forged note did not bear a revenue stamp, it would necessitate a verdict of not guilty.—State v. Peterson, N. Car., 40 S. E. Rep. 9.

91. FORGERY—Lost Instrument.—Where, on a prosecution for forgery, the instrument claimed to have been forged is lost, only its substance need be charged in the indictment.—State v. Peterson, N. Car., 40 S. E. Rep. 9.

92. FIRE INSURANCE—Acceptance of Policy Obtained by Agents of Other Companies.—An insurance agent, who, in accordance with a local custom among agents, turned an application over to the agent of another company, which issued a policy thereon, held to be the agent of such company in the transaction.—Queen Ins. Co. of America v. Union Bank & Trust Co., U. S. C. C. of App., Sixth Circuit, 111 Fed. Rep. 697.

93. FIRE INSURANCE—Knowledge of Agent as to Location of Goods.—Knowledge of an insurance company's agent as to the location of the goods insured and of a chattel mortgage held to be a waiver of the provisions of the policy relating to location and chattel mortgage.—Southern Ins. Co. v. Stewart, Miss., 30 South. Rep. 755.

94. FIRE INSURANCE — Liability of Misconduct of Referee.—A party does not assume the consequences of misconduct on part of referee, because it is known to him that he was a professional referee on behalf of the opposite party.—Christianson v. Norwich Union Fire Ins. Soc., Minn., 88 N. W. Rep. 16.

95. FIRE INSURANCE—Option to Pay or Rebuild.—Option to pay damages for alleged loss or to rebuild may be exercised by insurance company at any time before the expiration of the time prescribed in the policy.—Lancashire Ins. Co. v. Barnard, U. S. C. C. of App., Eighth Circuit, 111 Fed. Rep. 702.

96. FIRE INSURANCE — Second-hand Property in Schedule.—In a suit on an insurance policy, the fact that second-hand property was inserted in schedules with the full original cost set against it held not to show willful fraud on the part of the assured.—Beyer v. St. Paul Fire & Marine Ins. Co., Wis., 88 N. W. Rep. 57.

97. FIRE INSURANCE — Waiver of Delinquency by Receipt of Subsequent Assessments.—Where all property covered by insurance policy has been destroyed by fire while policy holder is delinquent, receipt of subsequent assessments, levied after loss, with knowledge of the fact, held a waiver of the delinquency.—Johnston v. Phelps County Mut. Ins. Co., Neb., 88 N. W. Rep. 142.

98. FRAUDS, STATUTE OF — Promise to Pay After Acquired Debt of Another.—Promise of defendant to pay for services rendered to a third person, made before the services were rendered, held within the statute of frauds.—Swigart v. Gentert, Neb., 88 N. W. Rep. 159.

99. FRAUDULENT CONVEYANCES — Conveyance to Wife in Excess of Debt Due Her.—Where property conveyed to the wife was in excess of the debt due to her, the property will be sold, and the debt of the wife declared a lien, and any balance paid over to the creditors of the husband.—Wright v. Craig, Oreg., 66 Pac. Rep. 807.

100. FRAUDULENT CONVEYANCES—Deed to Son as Trustee for Wife and Children.—Deed from father to minor children to pay debts due by him to their mother, with provision that the rents shall be applied to the support of the grantees, held not a reservation for the benefit of the grantor, making the deed void.—Eufaula Nat. Bank v. Pruett, Ala., 30 South. Rep. 731.

101. GARNISHMENT — Rights of Intervener.—Intervener, in absence of a lien on the fund garnished or an assignment before service of writ, cannot question the validity of the judgment.—Phillips v. Hogue, Neb., 88 N. W. Rep. 180.

102. GARNISHMENT — Validity of Mortgage to Garnishee.—Where garnishee admits possession of property, and asserts mortgage lien thereon, plaintiff can put in issue validity of mortgage.—Grainger v. First Nat. Bank, Neb., 88 N. W. Rep. 121.

103. GIFT — Bond Obligations.—Obligation of bond executed to a father-in-law, binding the obligee to pay a certain sum to his sister-in-law, held not a gift to the latter, requiring delivery.—Eitscheid v. Baker, Wis., 88 N. W. Rep. 52.

104. GUARANTY — Notice of Acceptance.—If one, receiving a guaranty of future credits, does not give reasonable notice of its acceptance, the guarantor will not be bound.—Wanamaker v. Benn, Del., 50 Atl. Rep. 512.

105. GUARDIAN AND WARD—Collateral Attack of Guardian's Sale.—The validity of a guardian's sale cannot be questioned in a collateral proceeding because of his failure to state the price in his report of the sale.—Taffinder v. Merrell, Tex., 65 S. W. Rep. 177.

106. HABEAS CORPUS—Release from Commitment.—Application for writ of *habeas corpus* denied, where it did not show that magistrate abused his discretion by committing petitioner; the evidence showing that a crime had been committed probably by the petitioner.—*In re* Levy, Idaho, 66 Pac. Rep. 806.

107. HIGHWAYS—Liability of Road Overseer for Extravagance.—Where a road overseer pays more than services or materials are reasonably worth, and not in good faith, he will be liable as for misconduct in office.—Town of Denver v. Myers, Neb., 88 N. W. Rep. 191.

108. HIGHWAYS—Petition to Establish Paving District.—Signatures to petition to establish paving districts which did not bind the owners of the property affected should not be counted in passing on validity of petition.—Batty v. City of Hastings, Neb., 88 N. W. Rep. 139.

109. HOMESTEAD — Homestead Without Residence of Wife.—Mortgage on government lands, about five months after proof of entry, where wife never actually resided on the land, held valid.—Broken v. Baumann, N. Dak., 88 N. W. Rep. 84.

110. HOMICIDE—Convict Resisting Arrest.—Where an escaping convict procures a loaded rifle and kills one of the posse attempting his rearrest, the killing is murder in the first degree.—State v. Craft, Mo., 65 S. W. Rep. 280.

111. HOMICIDE — Threats to Prove Self-Defense.—On a trial for murder, when the defense is self-defense, evidence of threats made by deceased is admissible.—State v. Smith, Mo., 65 S. W. Rep. 270.

112. HOMICIDE—Under Federal Law.—The elements of felonious homicide under the laws of the United

States are to be determined by the rules of the common law.—United States v. Lewis, U. S. C. C., W. D. Tex., 111 Fed. Rep. 630.

113. HUSBAND AND WIFE—Debt Due Husband from Wife.—Where the compensation for services rendered by husbands to their wives in the management of business belonging to the wives is more than sufficient to support and maintain their families, the excess is a debt due from the wives and subject to claims of husbands' creditors.—Catlett v. Alsop, Va., 40 S. E. Rep, 34.

114. HUSBAND AND WIFE—Joinder of Wife in Mortgage Deed.—Under Const. 1868, the joinder of a wife in a mortgage deed held unnecessary as to property purchased in 1854.—Cawfield v. Owens, N. Car., 40 S. E. Rep. 62.

115. INDICTMENT AND INFORMATION — Caption.—Where the record shows the court in which an indictment is found, it is not absolutely necessary to state the name of the court in the caption.—State v. Craft, Mo., 65 S. W. Rep. 280.

116. INDICTMENT AND INFORMATION—Evidence of Violation After Information.—Under an information charging violation of an ordinance, evidence of violation after information filed will not support conviction.—City of St. Joseph v. Dienger, Mo., 65 S. W. Rep. 223.

117. INJUNCTION—Counsel Fees as Element of Damages.—Counsel fees on trial of case held not an element of damages for injunction wrongfully obtained, where the injunction was ancillary to the main case.—Cunningham v. Finch, Neb., 88 N. W. Rep. 158.

118. INSANE PERSONS—Inquisition Without Notice or Presence of Alleged Lunatics.—An order appointing a committee for a lunatic, when the lunatic was not present and had no notice of the proceeding, was void, and was not constructive notice of anything.—Arnett's Committee v. Owens, Ky., 65 S. W. Rep. 151.

119. JUDGES—Stipulation Selecting Special Judge.—An attorney in a criminal case held to have authority to bind his client by stipulation selecting special judge, under Rev. St. 1899, §§ 1679, 1683.—State v. Downs, Mo., 65 S. W. Rep. 258.

120. JUDGMENT—Default Without Personal Service.—Under Rev. St. 1899, § 570, a judgment by default on service of summons failing to show that a copy of the petition and writ were left at the usual place of abode of defendant is void.—Rosenberger v. Gibson, Mo., 65 S. W. Rep. 237.

121. JUDGMENT—Entry of Judgment by Initials.—A judgment on a judgment note, entered in favor of an assignee of the note by his initials, and not his full christain name, is void.—Dickerson v. Kelley, Del., 50 Atl. Rep. 512.

122. JUDGMENT—Fraud in Obtaining Judgment.—Fraud in obtaining a judgment may be pleaded as a defense to an action for its enforcement, brought in the same court in which the judgment was rendered.—Ft. Jefferson Imp. Co. v. Greene, Ky., 65 S. W. Rep. 161.

123. JUDGMENT—Relief Against Fraudulent Satisfaction.—On application for relief against fraudulent satisfaction of a judgment, money paid will be credited on the judgment without restitution thereof.—Fox v. State, Neb., 88 N. W. Rep. 176.

124. JUDGMENT—Right of Court to Amend Order in Term.—The rule that the court has full control over its orders during the term held to apply to a dismissal entered at instance of plaintiff.—Horton v. State, Neb., 88 N. W. Rep. 146.

125. JUDGMENTS—Where Plaintiff After Demurrer Declines to Plead Further.—Where plaintiff has replied to defendant's pleas, and a demurrer is interposed, but not disposed of, held error to render judgment against plaintiff for declining to plead further.—Louisville & N. R. Co. v. Walker, Ala., 30 South. Rep. 738.

126. JURY—Disqualification.—A juror in a criminal case held not disqualified simply if he has formed no opinion as to defendant's guilt.—State v. Craft, Mo., 65 S. W. Rep. 280.

127. JUSTICE OF THE PEACE—Failure to Enter Bill of Particulars.—Failure of justice to enter a bill of particulars on his docket held not prejudicial error.—Kuker v. Beindorff, Neb., 88 N. W. Rep. 190.

128. JUSTICES OF THE PEACE—Taxation of Costs.—Taxation of costs by a justice of the peace on motion for change of venue is fixed and absolute.—Moss v. Lindsay, Neb., 88 N. W. Rep. 119.

129. LANDLORD AND TENANT—Sublessee as Trustee for Lessees.—Lessors are necessary parties in a suit by lessees against their sublessee to have a lease taken by him declared in trust for the lessees.—Cook v. Basom, Mo., 65 S. W. Rep. 227.

130. LARCENY—Mortgaging Stolen Property.—On a prosecution for theft, a certified copy of a chattel mortgage executed by the accused on the alleged stolen article held admissible in evidence.—Swanner v. State, Tex., 65 S. W. Rep. 186.

131. LIBEL AND SLANDER — Words Charging Incontinency. — Whether words charging incontinency were a violation of a Code, § 1113, held to be a question for the jury.— State v. Harwell, N. Car., 40 S. E. Rep. 48.

132. LICENSES—Butchers and Cattle Buyers.—Laws 1899, ch. 11, § 51, subjects to license tax a person, not being a farmer, who buys cattle, butchers them, and sells the meat at his store in a town.—State v. Carter, N. Car., 40 S. E. Rep. 11.

133. LICENSES—Sale of Cattle.—Under Pub. Laws 1899, ch. 11, §§ 51, 71, held, that cattle bought by farmers to be grazed and fattened on their farms could be sold without a license.—State v. Spaugh, N. Car., 40 S. E. Rep. 60.

134. LIFE INSURANCE—Defense of Suicide.—The burden rests upon a life insurance company to establish a defense of suicide, pleaded in an action on the policy —Fidelity & Casualty Co. of New York v. Love, U. S. C. C. of App., Fifth Circuit, 111 Fed. Rep. 773.

135. LIMITATION OF ACTIONS—One of Several Parties to Bill Barred.—Where rights of one of several parties to a bill are barred by limitations, no relief can be granted.—Love v. Butler, Ala., 30 South. Rep. 735.

136. MALICIOUS PROSECUTION—Communicating All Facts to Attorney.—Where a party has communicated to his attorney all the facts of which he has knowledge, or could have ascertained by reasonable diligence and inquiry, the want of probable cause is negatived, in the absence of malice.—Sandoz v. Veazie, La., 30 South. Rep. 767.

137. MALICIOUS PROSECUTION—Loss of Credit.—Evidence as to loss of credit held admissible under a general court for exemplary damages in an action for malicious prosecution.—Curlee v. Rose, Tex., 65 S. W. Rep. 197.

138. MANDAMUS—Issuance of Liquor License.—*Mandamus* granted to compel issuance of liquor license, if applicant is a proper person and the place at which he wishes to sell a proper place.—Loughran v. City of Hickory, N. Car., 40 S. E. Rep. 46.

§ 139. MANDAMUS—Suspending Judgment of Mandamus.—A judgment awarding *mandamus*, from which an appeal has been granted, may be suspended by the execution of a *supersedeas* bond.—Wyatt v. Ryan, Ky., 65 S. W. Rep. 129.

140. MASTER AND SERVANT—Assuming Risk of Fellow Servant's Incompetency.—A servant held not necessarily to have assumed the risk of the incompetency of a fellow-servants where he gives notice to the master of such incompetency, who promises to discharge him, in consequence of which plaintiff is induced to remain in the master's service and is injured.—Gray v. Red Lake Falls Lumber Co., Minn., 88 N. W. Rep. 24.

141. MASTER AND SERVANT—Assumption of Risk.—Servant held not to have assumed the risk incident to his employment, where he was working under the di-

rect superintendence of his foreman.—Faulkner v. Mammoth Min. Co., Utah, 66 Pac. Rep. 799.

142. MASTER AND SERVANT—Foreman and Employee as Fellow-Servants.—Under the statutes of Texas, the foreman of a bridge gang on a railroad is not a fellow-servant with a workman under his charge and control, but is a vice-principal, for whose negligence, resulting in an injury to the workman, the company is responsible.—Texas & P. Ry. Co. v. Carlin, U. S. C. C. of App., Fifth Circuit, 111 Fed. Rep. 777.

143. MASTER AND SERVANT—Foreman as Fellow-Servant.—In an action against a master for injuries from failure of defendant's foreman to give plaintiff warning of danger, held, that the plaintiff and foreman were fellow-servants.—Mikolojczak v. North American Chemical Co., Mich., 88 N. W. Rep. 75.

144. MASTER AND SERVANT—Servant's Lack of Knowledge of Defect.—Where a railway brakeman did not know of the defective condition of a switch, the fact that he might have gained such knowledge by inspecting it is no defense in an action for his death.—San Antonio & A. P. Ry. Co. v. Waller, Tex., 65 S. W. Rep. 210.

145. MECHANICS' LIENS — Cross Bill Alleging Damages.—In a suit to enfore a mechanic's lien under Gen. St. p. 2078, defendant's answer, by way of a cross bill, alleging damages resulting from complainant's failure to perform his contract, held properly dismissed.—Norton v. Sinkhorn, N. J., 50 Atl. Rep. 506.

146. MECHANICS' LIENS—Superior to Mortgagee.—A lien of a mechanic held superior to the rights of a mortgagee purchasing at foreclosure sale after the filing of the lien.—Hanchey v. Hurley, Ala., 30 South. Rep. 742.

147. MINES AND MINERALS—Relocation After Entry.—After entry of a mining claim in the land office, a relocation of the premises cannot be made by another so long as that entry stands, and such a relocator acquires no rights of possession or otherwise which will sustain a suit by him in the courts to compel a conveyance to him of the legal title.—Neilson v. Champaigne Min. & Mill. Co., U. S. C. C., D. Colo., 111 Fed. Rep. 655.

148. MORTGAGES—Deficiency Judgment on Foreclosure.—Where judgment for deficiency is asked on foreclosure, and entered, defendants cannot, while such decree is in force, set up defense on motion for deficiency judgment, though they were not liable.—Patrick v. Nat. Bank of Commerce, Neb., 88 N. W. Rep. 188.

149. MORTGAGES—No Lien Without Proper Acknowledgment.—It is a rule of property in Arkansas, that a mortgage, although filed for record, creates no lien as against subsequent purchasers unless it is properly acknowledged, even when such purchasers have actual knowledge of its existence and contents.—Cumberland Bldg. & Loan Assn. v. Sparks, U. S. C. C. of App., Eighth Circuit, 111 Fed. Rep. 647.

150. MORTGAGES — Survivorship Between Mortgage Trustees.—Where there are two trustees in a mortgage with power of sale, the power devolves on the survivor.—Cawfield v. Owens, N. Car., 40 S. E. Rep. 62.

151. MORTGAGES—When Mortgagee is Liable for Rents.—Where a deed absolute in form is in fact a mortgage, grantee in possession held a mortgagee in possession, and liable for rents and profits.—Richter v. Noll, Ala., 30 South. Rep. 740.

152. MUNICIPAL CORPORATIONS—Injury from Snow on Sidewalk.—City charter and Rev. St. 1898, § 1339 (as amended by Laws 1899, ch. 305), held to absolve city from liability for injuries arising from accumulation of snow on sidewalk, unless the same existed continuously for three weeks immediately prior to the happening of the injury.—Byington v. City of Merrill, Wis., 88 N. W. Rep. 26.

153. MUNICIPAL CORPORATIONS — Knowledge by Plaintiff of Defective Sidewalk.—That plaintiff was familiar with the conditon of the sidewalk was not such conclusive evidence of negligence on his part as to entitle defendant to a peremptory instruction.—Town of Fordsville v. Spencer, Ky., 65 S. W. Rep. 132.

154. MUNICIPAL CORPORATIONS—Preventing Obstruction of Public Street.—A landowner may maintain injunction to prevent the obstruction of a public street which runs along the side of his property, he having an especial interest therein.—Longworth v. Sedevic, Mo., 65 S. W. Rep. 260.

155. MUNICIPAL CORPORATIONS—Requisites in Passage of Ordinance.—Where journal entries show only that on passage of an ordinance the yeas and nays were called, and a majority of the council voted, but omitted to show the names of the members or how each voted, the ordinance was not legally adopted.—Pickton v. City of Fargo, N. Dak., 88 N. W. Rep. 90.

156. MUNICIPAL CORPORATIONS—Unwarranted Extension of Franchise.—Extension of franchise, though made in the form of an ordinance, held not free from the interposition of the courts by injunction, where contrary to the city's statutory charter.—Poppleton v. Moores, Neb., 88 N. W. Rep. 128.

157. NAMES—Proof of Signature.—On a prosecution for theft, a copy of a chattel mortgage on the alleged stolen article, signed by "W G S," was admissible where it was shown the accused signed his name in this manner, though he was generally known as "Green S."—Swanner v. State, Tex., 65 S. W. Rep. 186.

158. NEGLIGENCE — Allegations of Negligence as to Spreading Fires.—A petition alleging that defendant set out a fire which spread to plaintiff's premises held not to state a cause of action showing negligence of defendant.—Vansyoc v. Freewater Cemetery Assn., Neb., 88 N. W. Rep. 162.

159. NEGLIGENCE — Averment of Contributory Negligence.—In an action for personal injury, it is not incumbent upon the plaintiff to aver that he is not guilty of contributory negligence.—City of Winchester v. Carroll, Va., 40 S. E. Rep. 37.

160. NEGLIGENCE — Collision Between Car and Wagon.—Where a passenger in a street car was killed in a collision between the car and a wagon, no presumption of negligence arose in a suit against the railroad and the owner of the wagon.—Harrison v. Sutter St. Ry. Co., Cal., 66 Pac. Rep. 787.

161. NEGLIGENCE—Invitation to Child to Go on Turntable.—Where an invitation to children to go on a turntable to play is inferable from its attractiveness, it is immaterial on whose premises a child was when she accepted the invitation to play thereon.—San Antonio & A. P. Ry. Co. v. Skidmore, Tex., 65 S. W. Rep. 215.

162. NEGLIGENCE — Meaning of "Accident."—The word "accident" held to mean the result of human fault which is actionable negligence.—Ullman v. Chicago & N. W. Ry. Co., Wis., 88 N. W. Rep. 41.

163. NEGLIGENCE—Proof of Contributory Negligence.—In an action for the death of an employee, the defendant held not bound to sustain a plea of contributory negligence by proof that, but for the alleged contributory negligence of plaintiff, the accident would not have occurred.—Norfolk & W. Ry. Co. v. Cromer's Admr., Va., 40 S. E. Rep. 54.

164. NEGLIGENCE—When a Question of Law.—A question of negligence dependent on evidence is one of law for the court only where there is no material conflict and the facts are such that all reasonable men must draw the same conclusions from them.—Texas & P. Ry. Co. v. Carlin, U. S. C. C. of App., Fifth Circuit, 111 Fed. Rep. 777.

165. NEW TRIAL — Amendment Nunc Pro Tunc.—Where clerk fails to enter order for continuance of a motion for a new trial to the next term, the court at a subsequent term can amend the minutes *nunc pro tunc*.—*Ex parte* Humes, Ala., 30 South. Rep. 732.

166. NEW TRIAL — Costs as Condition Precedent.—

Costs are not to be imposed as a condition to grant of new trial for error of the court.—Maxon v. Gates, Wis., 88 N. W. Rep. 54.

167. PARTITION — Liability for Rents.—Defendant in partition held liable to plaintiff for rents accruing pending appeal and before sale on the basis of the rental value of the property.—Kalteyer v. Wipff, Tex., 65 S. W. Rep. 207.

168. PARTNERSHIP—Application of Firm Property to Individual Liability.—A partner cannot apply partnership property to his individual liability without consent of partner.—Ulrich v. McConaughey, Neb., 88 N. W. Rep. 150.

169. PATENTS — Accounting for Infringement of Dormant Patent.—Where a patent has lain dormant for 15 years, and has been infringed by defendant for 7 years with the knowledge of complainant, and without a word of protest, a decree for an accounting should not be granted.—Westinghouse Air Brake Co. v. New York Air Brake Co., U. S. C. C., N. D. N. Y., 111 Fed. Rep. 741.

170. PERJURY—False Statements Under Oath Which is Illegally Required.—Under Rev. St. § 4321, recorder held not authorized to swear an applicant for a marriage license and to receive his testimony as to the consent of the girl's parents; and hence false testimony under such circumstances is not perjury, within section 2033.—State v. Carpenter, Mo., 65 S. W. Rep. 255.

171. PERJURY—Inducing Another to Commit Perjury.—The alleged fact that a person was induced to commit perjury by accused may be established by his uncorroborated evidence.—State v. Renswick, Minn., 88 N. W. Rep. 22.

172. PERJURY — Proving Record of Testimony.—On a prosecution for perjury in falsely testifying on a certain prosecution, held essential that the existence of such prosecution be proved by the record, and not by oral testimony of the clerk of the court.—Whittle v. State, Miss., 30 South. Rep. 722.

173. PLEADING—Inconsistent Pleas.—A general denial and a plea of justification held inconsistent in an action for damages for personal abuse and personal injury.—Turnbow v. Wimberly, La., 30 South. Rep. 747.

174. PLEDGES—Parties on Foreclosure.—On foreclosure of pledged stock, an assignee of the pledgor is a necessary party.—Brown v. Hotel Assn. of Omaha, Neb., 88 N. W. Rep. 175.

175. PRINCIPAL AND AGENT — Repudiating Agent's Agreement.—A principal cannot retain fruits of agent's contract and repudiate agreement.—Piano Mfg. Co. v. Nordstrom, Neb., 88 N. W. Rep. 164.

176. PROCESS—Service of Summons Against City.—A summons against the city was properly served on the mayor and on the secretary of the board of aldermen.—Loughran v. City of Hickory, N. Car., 40 S. E. Rep. 46.

177. PUBLIC LANDS — Jurisdiction of State Courts.—State court will assume jurisdiction of disputes to right of possession of government lands.—Mathews v. O'Brien, Minn., 88 N. W. Rep. 12.

178. RAILROADS—Failure to Construct Plank Crossings.—Failure of a railroad company to construct certain plank crossings held not to work a forfeiture of the right of way under the terms of the grant.—Gratz v. Highland Scenic R. Co., Mo., 65 S. W. Rep. 223.

179. RAILROADS—Use of Track as Walkway.—In an action against a railroad company for the killing of a person on the track, evidence that the track is used by the public as a walkway is admissible.—Hord v. Southern Ry. Co., N. Car., 40 S. E. Rep. 69.

180. RAILROADS — Using Track as Walkway.—In an action against a railroad company for injuries to a person on the track, evidence that the track at the place in question was much used as a walkway by the public was properly received.—McCall v. Southern Ry. Co., N. Car., 40 S. E. Rep. 67.

181. RECEIVING STOLEN GOODS—Proof of Similarity.—In a prosecution for receiving stolen money, money found in the defendant's possession at the time of his arrest held admissible in evidence against him, where corresponding with that lost by the prosecuting witness.—Polin v. State, Tex., 65 S. W. Rep. 183.

182. REFERENCE — Conclusiveness of Findings.—Where a case is tried by referees, and no exceptions are filed to their report, the findings stand as the unchallenged verdict of a jury.—State v. Standard Oil Co., Neb., 88 N. W. Rep. 175.

183. RELEASE—Terminating Obligor's Liability.—Release of bond by obligee held not to terminate obligor's liability for the payment of a sum of money required by the bond to be paid a third person.—Eitscheid v. Baker, Wis., 88 N. W. Rep. 52.

184. REMOVAL OF CAUSES—Foreign and Domestic Corporations as Plaintiff.—An action against a railroad company cannot be removed to the federal court, where part of the plaintiffs are foreign corporations and part domestic.—Dobson v. Southern Ry. Co., N. Car., 40 S. E. Rep. 42.

185. REPLEVIN—Judgment for Value Against Plaintiff.—Plaintiff in replevin, who has disposed of the property, cannot complain that judgment is for the value of the property only.—Ulrich v. McConaughey, Neb., 88 N. W. Rep. 150.

186. REVENUE—Construction of Revenue Law.—The rule requiring a strict construction of criminal statutes is inapplicable to revenue law.—State v. Carter, N. Car., 40 S. E. Rep. 11.

187. ROBBERY—Bad Allegation of Ownership.—An indictment for robbery, which alleges that R is the owner of the property stolen, is bad, where the property actually belonged to R's employers.—State v. Morledge, Mo., 65 S. W. Rep. 226.

188. SCHOOL AND SCHOOL DISTRICTS — Liability of Superintendent.—A county school superintendent held not liable for mistaken performance of official duty involving the exercise of discretion.—Gridley School Dist. of Butte County v. Stout, Cal., 66 Pac. Rep. 725.

189. SEAMEN — Imprisonment to Coerce Service.—Since the passage of Act Dec. 21, 1898, 2 Supp. Rev. St., p. 897, the imprisonment of a seaman in a port to coerce him to perform a contract for service on a ship, is illegal, and a violation of his personal rights, which entitles him to damages.—The South Portland, U. S. D. C., D. Wash. 111 Fed. Rep. 767.

190. SHERIFFS AND CONSTABLES—Failure to Return an Execution.—Under Ky. St. § 1716, an action against a sheriff for failing to return within 30 days from the return day an execution issued from another county was properly brought in the county whence the execution issued.—Adams v. Simmons, Ky., 65 S. W. Rep. 152.

191. SHERIFFS AND CONSTABLES—Releasing Levy on Untrue Statements of Debtor.—In an action for conversion by releasing levy on exempt property, it is no defense that the inventory and oath of debtor were untrue.—McCormick Harvesting Mach. Co. v. Dunn, Neb., 88 N. W. Rep. 159.

192. SPECIFIC PERFORMANCE—Offer of Performance.—Equity will not compel parties to sign contracts, nor compel specific performance of contracts, unless plaintiff shows full performance or offer to perform.—Kulberg v. Georgia, N. Dak., 88 N. W. Rep. 87.

193. STATUTES—Journal Entries as to Vote on Bill.—As the constitution requires that on the voting on a bill before the legislature the ayes and noes shall be entered on the journals, either the noes must be on the journal, or it must affirmatively appear that there were none.—Commissioners of New Hanover Co. v. De Rosset, N. Car., 40 S. E. Rep. 43.

194. STATUTES—Passing Act Under Different Titles.—Pub. Acts 1901, No. 235, relating to the examination and licensing of barbers held invalid, because passed in the two houses under different titles.—Fillmore v. Van Horn, Mich., 88 N. W. Rep. 69.

195. STATUTES—Subject Not Properly Stated in Title.—Comp. St. ch. 13, art. 2, § 11, relating to the election of county assessor, in cities of more than 25,000 and less than 40,000 inhabitants, held unconstitutional because not contained in the title.—Haverly v. State, Neb., 88 N. W. Rep. 171.

196. STIPULATION—Validity of Admitted Judgment.—A stipulation admitting the rendition of a judgment the basis of a suit does not preclude the introduction of the whole record, to determine its validity.—Rosenberger v. Gibson, Mo., 65 S. W. Rep. 237.

197. STREET RAILROADS—Consent of Abutting Owners to Railroads.—Before a city can consent to an ordinance authorizing a railway in a street, the consent of a majority in interest of abutting owners must have been filed.—Currie v. City of Atlantic City, N. J., 50 Atl. Rep. 504.

198. TAXATION—Contesting Tax Title.—As a condition precedent to contesting the title to land purchased at a tax sale, the claimants must pay the taxes due thereon.—McMillan v. Hogan, N. Car., 40 S. E. Rep. 63.

199. TAXATION—Different Entries of Assessment.—The validity of the taxes on personalty is not affected by the fact that part of the defendant's property is entered on one page of the assessor's book and part on another page.—State v. Stamm, Mo., 65 S. W. Rep. 242.

200. TAXATION—Franchises.—The franchises of a street railroad appurtenant to the use of its property held not subject to a separate tax.—Dallas Consol. Electric St. Ry. Co. v. City of Dallas, Tex., 65 S. W. Rep. 201.

201. TAXATION—Notice to Delinquent Before Sale.—Where notice to delinquent taxpayer is not given as required by the constitution, a sale for taxes thereunder will be null.—Foreman v. Hinchcliffe, La., 30 South. Rep. 762.

202. TAXES—Sale at Low Figure.—A sale for taxes for 96 cents in excess of taxes, with interest and penalty, held to render the entire sale void.—Lee v. Crawford, N. Dak., 88 N. W. Rep. 97.

203. TAXATION—Stocks in Hand of Executors.—Stocks and bonds of a testator, in the hands of executors as trustees after termination of their duties as executors, should be assessed for municipal taxes at the respective domiciles of the executors.—Millsaps v. City of Jackson, Miss., 30 South. Rep. 756.

204. TAXATION—Validity of Proceedings.—The fact that the pleadings show that two contiguous lots were assessed, taxed, and sold together held not to render the tax proceedings illegal.—Pettibone v. Fitzgerald, Neb., 88 N. W. Rep. 143.

205. TELEGRAPHS AND TELEPHONES—Right of Rival Companies to Occupy Same Street.—A telephone company occupies the streets in a city with its lines, subject to the equal privilege of others subsequently granted the same rights, unless serious injury will be caused thereby to the operation of its own line.—Louisville Home Tel. Co. v. Cumberland Telephone & Telegraph Co., U. S. C. C. of App., Sixth Circuit, 111 Fed. Rep. 663.

206. TENANCY IN COMMON—Entry by the Tenant.—Entry by one tenant in common is not an entry at all, where there is an actual ouster.—Beall v. McMenemy, Neb., 88 N. W. Rep. 134.

207. TRESPASS—Homestead Entryman.—A homestead entryman in possession may sue a subsequent trespasser to recover damages in cropping the land.—Mathews v. O'Brien, Minn., 88 N. W. Rep. 12.

208. TRIAL—Defendant Testifying on Behalf of Plaintiff.—Where defendant has testified on behalf of plaintiff, plaintiff is not bound by his testimony, though unfavorable.—Town of Denver v. Myers, Neb., 88 N. W. Rep. 191.

209. TRIAL—Informing Jury as to Special Questions.—Giving of general instructions calculated to inform jury how to answer questions in a special verdict in order to enable party to recover held reversible error.—Byington v. City of Merrill, Wis., 88 N. W. Rep. 26.

210. TRIAL—Proper Instruction.—An instruction in substance embraced in the main charge is properly refused.—San Antonio & A. P. Ry. Co. v. Skidmore, Tex., 65 S. W. Rep. 215.

211. TRIAL—Ruling in Nonsuit.—Under Acts 1901, ch. 594, a defendant who introduces evidence after moving for a nonsuit cannot, on appeal, assign as error the court's ruling thereon.—McCall v. Southern Ry. Co., N. Car., 40 S. E. Rep. 67.

212. USURY—Defense.—Where defense of usury is set up as originating in one of two contracts sought to be enforced, it is error to treat both contracts as usurious.—Harn v. American Mut. Bldg. & Sav. Assn., Tex., 65 S. W. Rep. 176.

213. VENDOR AND PURCHASER—Bond for Title.—A vendee, holding a bond for title, is the equitable owner of the land, and on his death it descends to his heirs.—Love v. Butler, Ala., 30 South. Rep. 735.

214. VENDOR AND PURCHASER—Compensation for Improvements After Forfeiture.—Where defendant went into possession under a contract to purchase, he is not entitled to compensation for improvements after he forfeits his contract.—Coleman v. Stalnacke, S. Dak., 88 N. W. Rep. 107.

215. WAREHOUSEMEN—Transfer of Warehouse Receipt.—The transfer of a warehouse receipt issued under Hill's Ann. Laws, § 4201 *et seq.*, leaves no attachable interest in the assignor.—Adamson v. Frazier, Oreg., 66 Pac. Rep. 810.

216. WATERS AND WATER COURSES—Cutting off Percolating Waters.—Where a landowner dug a ditch on his own land, and thereby cut off percolating waters, which formed a spring on adjoining land, the damage occasioned to the adjoining proprietor was *damnum absque injuria*.—Miller v. Black Rock Springs Imp. Co., Va., 40 S. E. Rep. 27.

217. WATERS AND WATER COURSES—Extending Right of Water Company.—An ordinance extending right of water company to exercise its franchise free from city's option to purchase, without compensation, without submission of question to a popular vote, is forbidden by Comp. St. 1897, ch. 12a, § 19.—Popiston v. Moores, Neb., 88 N. W. Rep. 128.

218. WILLS—Contract for Testamentary Provision.—Where a person contracts to make provision in his will in settlement of a claim against him, and does so, there is no ground on which to base a subsequent claim under the agreement against his estate.—Drinkhouse v. Merritt, Cal., 66 Pac. Rep. 785.

219. WILLS—Presumption of Widow's Election to take Under Will.—A widow, suing to enforce provisions of the foreign will of her husband in her favor, will be presumed to have elected to take under such will.—Waterfield v. Rice, U. S. C. C. of App., Sixth Circuit, 111 Fed. Rep. 625.

220. WILLS—Remainder Unaffected by Power of Appointment.—A devise to testator's wife for life, "and then to be divided among my children, or otherwise, as she may deem best," creates a vested remainder in the children living at testator's death, unaffected by the power of appointment.—Lantz v. Massie, Va., 40 S. E. Rep. 50.

221. WITNESSES—Declaration of Testator.—Under Civ. Code Prac. § 606, subsec. 1, a widow who is contesting the will of her deceased husband may testify as to declarations made by him during the marriage.—Murphy's Exr. v. Murphy, Ky., 65 S. W. Rep. 165.

222. WITNESSES—Impeachment by Evidence at Former Trial.—That a party testified otherwise in a former action held to go only to his credibility.—Hahn v. Bettingen, Minn., 88 N. W. Rep. 10.

223. WITNESSES—Incompetency.—A judgment of conviction renders a witness incompetent.—Chambers v. State, Tex., 65 S. W. Rep. 192.